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EDITOR'S NOTE

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No. 83-1660-CFX
Status: GRANTED

Title: Charles M. Atkins, Commissioner of the Massachusetts
Department of Public Welfare, Petitioner
v.
Gill Parker, et al.

Docketed:
April 9, 1984

Court: United States Court of Appeals
for the First Circuit

Vide:
83-6381

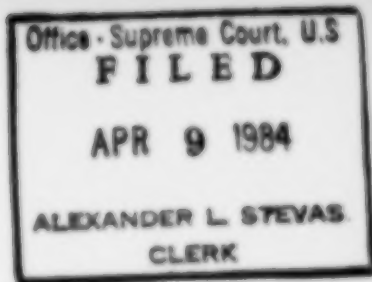
Counsel for petitioner: Janos, Ellen L., Solicitor General
Counsel for respondent: Solicitor General, Hitov, Steven A.

Entry	Date	Note	Proceedings and Orders
1	Apr 9 1984	G	Petition for writ of certiorari filed.
2	Apr 9 1984		Appendix of petitioner Atkins, Commr. of MA Dept. filed.
4	May 11 1984		Order extending time to file response to petition until May 29, 1984.
5	May 14 1984		Brief of respondents Gill Parker, et al in opposition filed.
6	May 14 1984	G	Motion of respondents Gill Parker, et al. for leave to proceed in forma pauperis filed.
7	Aug 10 1984		DISTRIBUTED. *****
9	May 29 1984	X	Brief of respondent United States in opposition filed. VIDED.
10	Jun 18 1984		Motion of respondents Gill Parker, et al. for leave to proceed in forma pauperis GRANTED.
11	Jun 18 1984		Petition GRANTED. The case is consolidated with 83-6381, and a total of one hour is allotted for oral argument. *****
12	Jun 26 1984		Briefing schedule approved as follows: 1. The State and the federal respondent will file and serve their briefs, limited to the issues presented in No. 83-1660, on or before August 2, 1984. 2. Parker, et al. will file and serve a brief answering the State's brief and the federal respondent's brief in No. 83-1660, and addressing the issues presented in No. 83-6381, on or before September 4, 1984. 3. The State and the federal respondent will each file and serve a brief answering Parker's brief in No. 83-6381, and serving as reply brief in No. 83-1660, on or before September 25, 1984. 4. Parker, et al. will file and serve a reply brief, limited to the issues in No. 83-6381, on or before October 23, 1984.
19	Aug 3 1984		Brief amicus curiae of States of Illinois, Indiana, Pennsylvania and Wisconsin filed. VIDED.
20	Aug 2 1984		Brief of respondent United States supporting reversal filed. VIDED.
21	Aug 4 1984		Joint appendix filed. VIDED.
22	Aug 2 1984		Brief amicus curiae of Washington filed.
23	Aug 2 1984		Brief of petitioner Atkins, Commr. of MA Dept. filed. VIDED.
24	Aug 15 1984	G	Motion of the Solicitor General for divided argument filed.
25	Aug 10 1984		Record filed.

Entry	Date	Note	Proceedings and Orders
26	Aug 17 1984	Application of petitioners for leave to file a brief on the merits in excess of the page limits filed and order granting same not to exceed 80 pages by Brennan, J. August 20, 1984 (A-108).	
27	Aug 17 1984		
29	Aug 28 1984	Brief of Gill Parker, et al. filed. VIDE.	
30	Sep 18 1984	Motion of the Solicitor General for divided argument GRANTED.	
31	Sep 28 1984	Reply brief of petitioner Atkins, Commr. of MA Dept. filed.	
32	Oct 5 1984	Reply brief of petitioner United States filed. VIDE.	
33	Oct 17 1984	Reply brief of petitioners Gill Parker, et al. filed. VIDE.	
34	Oct 19 1984	CIRCULATED.	
35	Oct 22 1984	SET FOR ARGUMENT. Tuesday, November 27, 1984. This case is consolidated with No. 83-6381. (3rd case) (1 hour).	
36	Oct 29 1984	Motion of the Solicitor General to strike portions of the reply brief of Parker, et al. filed.	
37	Nov 5 1984	Opposition of respondent Parker to motion of the Solicitor General to strike portions of the reply filed.	
38	Nov 5 1984	DISTRIBUTED. Nov. 9, 1984. (Motion of S.G. to strike portions of the reply brief of respond./petr. Gill.	
39	Nov 6 1984	Reply of the Solicitor General in support of motion to strike filed.	
40	Nov 13 1984	Motion of the Solicitor General to strike portions of the reply brief of Parker, et al. DENIED.	
41	Nov 27 1984	ARGUED.	

CROSS PETITION

83 - 1660



No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

CHARLES M. ATKINS, Commissioner of
the Massachusetts Department of
Public Welfare,

Cross-Petitioner,

v.

GILL PARKER, ET AL.,

and

JOHN R. BLOCK, Secretary of the
United States Department
of Agriculture,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

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42 pp

QUESTIONS PRESENTED

1. Whether a notice sent to more than 16,000 food stamp households, informing them of federal statutory changes in the earned income deduction and providing them with a detailed explanation of their right to appeal any reduction or termination of benefits, satisfied the requirements of the Due Process Clause.

2. Whether the Court of Appeals erred in refusing to review independently findings of fact which determined the constitutional question.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 722 F.2d 933 (1st Cir. 1983). The opinion of the United States District Court for the District of Massachusetts has not been reported as of the date of this cross-petition. Both opinions are reprinted in a separately bound Appendix to this cross-petition.^{1/}

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the First Circuit was entered on December 7, 1983. Cross-

^{1/} The Appendix to this cross-petition is hereafter referred to as "A."

Respondent Parker's motion for extension of time to file a petition for rehearing was denied on March 6, 1984.

This cross-petition is being filed in accordance with Rule 19.5 of the Rules of the Supreme Court. The petition for a writ of certiorari was received on March 9, 1984.

CONSTITUTIONAL PROVISION AND
RULE INVOLVED

Constitution of the United States,
Amendment XIV, Due Process Clause:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

Federal Rules of Civil Procedure,
Rule 52(a):

"...Findings of fact shall not be set aside unless clearly erroneous..."

STATEMENT OF THE CASE

The Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 357 (1981) amended the Food Stamp Act of 1977 by lowering a participating household's earned income deduction from 20% to 18%.^{2/} Since the statutory change affected a substantial number of households, the Secretary of Agriculture authorized states to issue "mass change" notices rather than individual notices of adverse action. 46 Fed. Reg. 44712, 44722 (September 4, 1981).^{3/}

^{2/} Pub. L. No. 97-35, § 106.

^{3/} The Secretary's food stamp regulations contemplate various types of notice of reduction or termination depending upon the nature of the change taking place. Compare 7 C.F.R. § 273.12(e)(1981) (mass change notice) with 7 C.F.R. § 273.13(1981) (individual adverse action notice).

Accordingly, at the end of November 1981, the Massachusetts Department of Public Welfare (the Department) issued a mass change notice, dated "11/81" (the November notice), to over 16,000 food stamp households with earned income. It informed them of the statutory change in the earned income deduction, stated the manner by which an appeal could be taken, and explained that if an appeal was claimed within ten days, benefits would not be reduced.

A class action, in behalf of all households which received the November notice, was commenced on December 9, 1981. The District Court certified the class and issued a temporary restraining order enjoining any benefit reductions based upon the November notice because it did not include a precise date from which households could compute their appeal period.

At the end of December 1981, the Department issued a second, two-part, notice dated December 26, 1981 (December notice). The first part explained the effect of the restraining order on the households' benefits and appeal rights; the second part^{4/} was virtually identical to the November notice and again informed the households of the federal statutory change and their appeal rights.^{5/}

After a two-day trial in October 1982, which combined the preliminary

^{4/} The second part of the December notice is reprinted in the Court of Appeals decision, 722 F.2d at 936; A. 6-8.

^{5/} The plaintiffs sought a temporary restraining order enjoining the use of the December notice. The District Court denied that request. 722 F.2d at 936; A. 8.

injunction hearing with a hearing on the merits, the District Court held that the December notice failed to meet the requirements of the Due Process Clause. The District Court specifically found that the mass change notice was insufficient because it did not contain individual financial data for each household and because the wording, syntax, print size, and line lengths made the notice difficult to understand. A. 96-97. The District Court awarded retroactive benefits to all 16,000 members of the plaintiff class and entered a permanent injunction prescribing the format and content of all future food stamp notices.

On appeal, the First Circuit, using the narrow standard of review required by Fed. R. Civ. P. 52(a) for all factual findings, affirmed the District Court

conclusion that the notice did not meet the requirements of the Due Process Clause. However, it set aside the permanent injunctive relief and a major portion of the retroactive relief.

The plaintiffs filed a petition for a writ of certiorari on the remedy issues to which the Department has filed a brief in opposition. The Department is filing a cross-petition because this case presents this Court with the first opportunity to address the due process requirements for a mass change notice of reduction or termination of benefits. This case is of particular importance to government agencies throughout the country charged with the implementation of the ever-increasing statutory and regulatory changes in a vast number of entitlement programs. In ruling that the validity of agency action may depend upon an

extraordinarily intense after the fact scrutiny of the notice of action, the decisions below have destroyed the agencies' ability to take predictable, reliable actions in response to changes in the law.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DUE PROCESS ANALYSIS UTILIZED TO DECLARE THIS MASS CHANGE NOTICE UNCONSTITUTIONAL SIGNIFICANTLY DEPARTS FROM THIS COURT'S DECISION IN MATHEWS V. ELDRIDGE.

A. In Concluding That The Recipients Were Denied Due Process, The Courts Below Failed To Consider The Totality Of Procedures Available.

This case involves the constitutionality of a mass change notice, announcing an across-the-board change in one minor aspect of the Food Stamp Program, which had the effect of reducing a household's

benefits by an average of five dollars per month. Both the District Court and the Court of Appeals purported to apply Mathews v. Eldridge, 424 U.S. 319 (1976), to determine whether the plaintiffs were afforded due process.^{6/} The method by

6/ While the application of Mathews to the sufficiency of the notice was not questioned below, an examination of this Court's cases suggests that the proper test of the adequacy of a notice was enunciated in Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950). Mullane holds that a notice satisfies due process if it apprises "interested parties of the pendency of the action and afford[s] them an opportunity to present their objections. . . . The notice must be of such a nature as reasonably to convey the required information. . . ." Id. at 314 Accord Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706, 2709 (1983). Mathews, however, holds that an evidentiary hearing is not required prior to a termination of disability benefits. This Court's decisions applying Mathews only involve the consideration of whether a

(footnote continued)

which the courts below tested the constitutional sufficiency of this notice, however, significantly departs from the methodology articulated in Mathews.

Mathews sets forth three factors which should be considered when determining whether administrative procedures are constitutionally sufficient:

(footnote continued)

hearing procedure, prior to the deprivation of a liberty or property interest, is either necessary or sufficient. E.g., Mackey v. Montrym, 443 U.S. 1 (1979); Schweiker v. McClure, 456 U.S. 188 (1982). Where both the notice and hearing procedure are challenged in one case, this Court has applied Mullane to examine the notice and Mathews to examine the adequacy of the hearing procedure. Memphis Light Gas & Water v. Craft, 436 U.S. 1, 13-19 (1974). As the decisions below demonstrate, the Mathews standard, applied to test the adequacy of a particular notice, can be a "virtual engine of destruction" with respect to an agency's execution of its duties. Cf. Weinberger v. Salfi, 422 U.S. 749, 773 (1975) (rejecting application of irrebutable presumption analysis to welfare legislation).

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 334-35.

In concluding that the Department's mass change notice failed to meet the requirements of the Due Process Clause, the courts below improperly applied the second Mathews factor, "the risk of erroneous deprivation . . . through the procedures used." Id. at 335.

Mathews examines the totality of the administrative procedures available to the claimant, from the agency's initial communication to the claimant up through

the opportunity for judicial review. Id. at 337-39. E.g., Mackey v. Montrym, 443 U.S. 1, 14-17 (1979). Here, however, the courts below focused exclusively on the form and content of the mass change notice. They virtually ignored that portion of the challenged notice which fully informed recipients of their right to appeal the Department's action,^{7/} their right to receive a continuation of benefits pending an appeal, and the precise manner^{8/} in which they should claim

^{7/} A proper appeal was not limited to a mistake in this particular recalculation but could be claimed for any reason.

^{8/} In order to appeal, recipients merely had to sign and date a form enclosed with the notice and return it to the address listed on the notice. An appeal which was requested orally, by telephone or in person, was also considered a valid appeal. A. 48.

an appeal.^{9/}

By not considering the sufficiency of the notice in conjunction with all the procedures available to challenge the proposed action, the courts below failed to truly consider whether the recipients were afforded due process prior to a deprivation of property. In Memphis Light Gas & Water Division v. Craft, 436 U.S. at 14-15, a utility's termination notice was held inadequate because it did not apprise the customer of the availability of a procedure to challenge the termination. This Court considered the information about a hearing procedure to be a critical aspect of the utility termination notice.

^{9/} At the completion of the appeal process, the Department's final administrative decision were subject to judicial review. Mass. Gen. Laws Ann. ch. 30A, § 14 (West 1979).

In contrast, the Department's mass change notice, in addition to informing those households with earned income of the federal statutory changes in the earned income deduction, also afforded them ample opportunity to present whatever objections they might have and fully explained that opportunity in the notice. E.g., Mullane v. Central Hanover Tr. Co., 339 U.S. at 314. Even though the Department was implementing an across-the-board mass change, where there was a minimal risk of a genuine factual dispute, recipients were afforded a full evidentiary hearing to present whatever claims they had. Thus, the notice of reduction, when viewed by itself, reasonably informed recipients of the federal change in the earned income deduction, and when considered in conjunction with the hearing procedures available, far exceeded the requirements of the Due Process Clause.

B. The Decisions Of The District Court And The Court Of Appeals Are Based Upon An Improper Assessment Of The Risk Of Erroneous Deprivation.

The courts below relied almost exclusively on the risk of erroneous deprivation in concluding that the notice announcing the change in the earned income deduction should have provided enough recipient-specific financial data so that a household could determine whether its benefits were properly calculated.

The District Court found that due to the implementation of numerous OBRA-mandated changes in other benefit programs as well as the food stamp program,^{10/}

^{10/} Among other things, OBRA required states to implement by October 1, 1981, substantial changes in eligibility criteria and benefit levels for the Food Stamp and Aid to Families with Dependent Children programs. See Pub. L. 97-35, §§ 101-116 and §§ 2301-2335.

there were delays in the entry of recipient data into the Department's computer^{11/} and therefore many households were likely to receive an incorrect benefit amount. A. 79.^{12/} It was this risk of benefit errors which the courts improperly equated with a risk of erroneous deprivation.

^{11/} The District Court found that the computer backlog was corrected by the end of December, prior to the time the reductions were actually made. A. 79.

^{12/} Significantly, the evidence did not show that any deficiency in the notice caused any loss. The facts "found" by the District Court were of a predictive nature, projecting an unacceptable risk of error due to circumstances which existed at the time the notice was sent.

Yet, curiously, though it accepted the District Court's finding as to the risk of error, the Court of Appeals reversed the award of retroactive benefits to the entire class "given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated." 722 F.2d at 933; A. 33.

The proper risk assessment, however, is an examination of the risk of error inherent in this notice of statutory reductions, see Mathews, 424 U.S. at 334-35, rather than an assessment of all pre-existing problems in case files which may have resulted in errors in the recipients' regular monthly benefits.

The risk of erroneous deprivation, attributable to the implementation of this across-the-board statutory change in the earned income deduction, was minimal. This federal change did not require the adjustment or addition of any individual data in a household's case file. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970)(termination of public assistance based upon individual factual circumstances). In those cases, the Secretary requires the Department to issue an indi-

vidual notice of adverse action. 7 C.F.R. § 273.13(a)(2)(1981). Here, however, a computer recalculation of each household's benefits, using existing financial and other relevant information, was performed. Thus, the only possible genuine dispute as to historical facts, arising from this particular statutory reduction, would relate to whether a household, in fact, had earned income. See Mackey v. Montrym, 443 U.S. at 14-15.^{13/}

Yet, even if an examination of the error rate in the Food Stamp program as a whole were appropriate, it does not support a finding of a risk of erroneous

^{13/} Surely, a recipient, without earned income, who receives a notice that his benefits may be reduced because of a change in the earned income deduction is put on notice that something may be amiss and is likely to file an appeal. In any event, there was no evidence at trial, that any of these households suffered any actual deprivation.

deprivation. During this period the error rate in Massachusetts was 13%, 11% of which constituted overpayments to the recipient. A. 77.

The lower courts' method of analyzing the risk of erroneous deprivation, by examining all possible errors from whatever source, is not only inconsistent with Mathews, it has far reaching effects on the the administration of public assistance programs. Under the Court of Appeals decision, as a matter of constitutional law, state and federal agencies, when announcing even the most minimal statutory or regulatory program reductions, would be required to include recipient-specific data in order to alert recipients of, not only potential errors stemming from the mass change, but also, those which might have occurred in their regular benefit check. While this might

be desirable as a matter of public policy, it imposes a tremendous burden on the states to administer already unwieldy entitlement programs, and certainly does not rise to the level of a constitutional requirement. It is not the role of the federal courts, under the aegis of the Due Process Clause, to ensure an error-free implementation of entitlement programs. That is best left to Congress and to those agencies charged with administering the programs. E.g., Califano v. Boles, 443 U.S. 282, 285 (1979) (fairness can be best ensured "through sound managerial techniques and quality control designed to achieve an acceptable rate of error"). As this Court has stated,

The Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or liberty' interest be so comprehensive as to preclude any possibility of error. The Due Process Clause

simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations. Mackey v. Montrym, 443 U.S. at 13.

Accordingly, mass change notices announcing statutory or regulatory changes in benefit programs, where the risk of factual error inherent in that change is minimal, should not be required, as a matter of constitutional law, to contain recipient-specific data.

C. The Probable Value Of A More Detailed Notice Was Not Significant.

The second part of a proper "risk of erroneous deprivation" analysis under Mathews is a determination of the probable value of different procedures. The courts below concluded that the mass change notice should have contained each household's old and new benefit amount, as well as its amount of earned income. A. 17-18, 90.

In the first place, however, the "value of different procedures" -- which is the issue in Mathews -- cannot necessarily be equated with the value of a more detailed notice, the question actually addressed by the courts below.^{14/}

In the second place, there is virtually no support in the record for the District Court's finding that the probable value of a more detailed notice was great. Certainly, a more detailed notice would not have made a difference with respect to any underlying errors. Therefore, the only potential benefit of a more detailed

^{14/} Whether a notice should contain more detail is distinguishable from the sufficiency of the manner of notice. Cf. Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983) (notice by publication or posting, rather than by mailing to the interested party, held to be insufficient).

notice is an increased likelihood of an appeal.^{15/} There was no evidence at trial that a recipient was discouraged from appealing the reduction of benefits because the notice did not contain individual financial information. To the contrary, it was the opinion of plaintiffs' expert on the administration of welfare programs that when a recipient is not clearly notified of some agency action, he or she is more likely to appeal or contact the agency by telephone. A. 76-77. The fact that all five recipients who represented the plaintiff class, and who purported to be confused by the notice, filed appeals, bears this out. A. 50, 53, 55, 56.

^{15/} A total of 403 households claimed an appeal. A. 49.

In sum, the District Court decision, as affirmed by the Court of Appeals, tests the constitutionality of this mass change notice in a manner which is entirely inconsistent with both Mullane and Mathews. The result, which places an affirmative burden on the Department to include certain individualized data in each of 16,000 mass change notices, clearly indicates that the Court of Appeals failed to recognize that "[t]he role of the judiciary is limited to determining whether the procedures meet the essential standards of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." Landon v. Plasencia, 103 S.Ct. 321, 330 (1982).

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE THE USE OF READING AND TYPOGRAPHICAL EXPERTS TO DETERMINE THE CONSTITUTIONALITY OF A MASS CHANGE NOTICE.

In order to pass constitutional muster a "notice must be of such nature as reasonably to convey the required information." Mullane v. Central Hanover Tr. Co., 339 U.S. at 314. Those agencies and officials charged with informing recipients of reductions in public benefit programs must be guided by this well-settled principle. This Court has repeatedly refused to set down more specific notice requirements because "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). Once it has been estab-

lished that notice is due an individual, the format and content must be tailored to the unique set of circumstances which give rise to that notice. Yet, the unusual manner by which the District Court undertook to assess the constitutionality of this mass change notice, results in an improper imposition of procedural requirements.

The District Court holding that the notice was unconstitutional was based, in part, upon its finding that the language of the notice was too complex to be understood by "many" recipients and that the format (i.e. the use of all capital letters, the type size, and length of lines) contributed to the complexity of the notice. A. 56-64, 67-69.

In reaching these findings, the District Court relied upon reading experts who predicted the difficulty of the

notice by employing a statistical formula which is largely based upon an examination of the vocabulary used. Thus, for example, the District Court found that the following words contributed to the difficulty of the notice: "within", "eligible", "appeal", "reduction", "action", "disagree", "welfare". A. 60, 64. As to legibility, the Court found "[t]he length of the lines in the December notice are from two to three times longer than that which is considered acceptable for text copy. . . . Considering the size of the point used and the line length, there should have been two points of additional line spacing." A. 68-69.

It is clear from the District Court findings, and their affirmance by the Court of Appeals, that the notice was

not reviewed to determine whether it reasonably conveyed the required information. Instead, the courts below looked to matters which trivialize the concept of due process. The choice of capital letters, type face, and vocabulary is simply not prescribed by the Fourteenth Amendment.

The result of the Court of Appeals decision is that government agencies, in order to ensure that future notices meet constitutional requirements, will have to analyze the reading ability of each group targeted to receive the notices and the services of reading experts will have to be utilized so that the notice does not contain words that are difficult to understand for that particular

group.^{16/} Moreover, the ultimate validity of administrative action will depend upon the outcome of a battle of experts in the courts, long after the action has been taken.^{17/}

In sum, the challenged notice adequately conveyed the message that Congress had lowered the earned income deduction. The analysis adopted by the District Court and affirmed by the Court

^{16/} Notwithstanding the District Court's finding to the contrary, given the complex nature of many entitlement programs including the Food Stamp Program, explaining statutory changes in a manner that can be easily understood by a person who reads at the fifth grade level is a formidable task.

^{17/} That the use of such words as "welfare," "eligible," and "appeal" in a notice to welfare recipients would render the notice invalid was surely not predictable when the notice was drafted.

of Appeals, conflicts with this Court's emphasis both that the Due Process Clause prescribes only minimal requirements and that due process is a flexible concept. This analysis threatens to destroy administrative flexibility by imposing a requirement that agencies provide the best notice possible, as determined after the fact by the courts.

III. THE STANDARD OF REVIEW USED BY THE COURT OF APPEALS EFFECTIVELY PRECLUDES APPELLATE REVIEW OF CONSTITUTIONAL QUESTIONS.

The Court of Appeals affirmed the decision of the District Court that the notice was unconstitutional using the "clearly erroneous" standard of review set forth in Fed. R. Civ. P. 52(a). 722 F.2d at 938; A. 19. This standard is used by the First Circuit to review mixed questions of law and fact as well as

purely factual questions. Id. While the propriety of using this limited standard to review mixed questions of law and fact is questionable, Pullman-Standard v. Swint, 456 U.S. 273, 289-90 n.19 (1982), the application of such a standard, where constitutional questions are involved, is clearly inappropriate.

This Court has held in a long line of decisions that it has a duty to independently review at least those factual matters which determine a constitutional question. E.g. Norris v. Alabama, 294 U.S. 587, 589-90 (1935); Jacobellis v. State of Ohio, 378 U.S. 184, 189 (1965). Estes v. State of Texas, 381 U.S. 532, 567 (1965) (Warren, J., concurring).

Similarly, other courts of appeals independently review factual determinations which are intermingled with constitutional questions. See, e.g., Cousins

v. City Council of City of Chicago, 466 F.2d 830, 837 (7th Cir. 1972), cert. denied, 409 U.S. 893; Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970), cert. denied, 401 U.S. 946 (1971); Porter v. Califano, 592 F.2d 770, 781 (5th Cir. 1979); but see Williams v. Eaton, 468 F.2d 1079, 1082 (10th Cir. 1972).

While the underlying rationale for the practice of independent review of both legal and factual matters is to ensure the safeguarding of constitutional rights, Norris v. Alabama, 294 U.S. at 590, it also serves to ensure that constitutional questions raising significant public policy issues are correctly and consistently decided by the lower federal courts.^{18/}

^{18/} Indeed, the standard of review adopted by the Court of Appeals deprives the Court of the ability to ensure the uniform application of the Due Process Clause even in its own circuit.

The increasing use of the Mathews v. Eldridge balancing test to determine whether due process has been afforded makes resolution of the appropriate standard of review especially important. Applying the balancing test necessarily involves factual determinations, some of which, such as the "risk of erroneous deprivation" or the "probable value of alternative procedures," both determine the ultimate constitutional question, and involve a good deal of speculation and judgment on which reasonable persons might disagree.^{19/} Under the Court of Appeals decision, which allows reversal

^{19/} The cross-petitioner disagrees with the extent of the District Court's factual inquiry particularly with respect to the reading abilities of the food stamp population, and the statistical tests regarding the reading level of the notice, to determine whether it reasonably conveyed information about the congressionally-mandated changes.

only if the appellate court has the "definite and firm conviction that a mistake has been committed," 722 F.2d at 938 (citing United States v. Gypsum Co., 333 U.S. 364, 395 (1948)); A. 20, district court decisions on significant due process questions become virtually unreviewable.


Accordingly, review and resolution of the applicable standard of review is appropriate for this Court.

CONCLUSION

For the foregoing reasons the Massachusetts Commissioner of Public Welfare requests that if the petition for a writ of certiorari is granted, his cross-petition be granted so that the entire case can be presented to this Court for review.

Respectfully submitted,

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Dated: April 9, 1984

APPENDIX

83 - 1660

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

Office - Supreme Court, U.S.
FILED
APR 9 1984
ALEXANDER L. STEVAS,
CLERK

CHARLES M. ATKINS, Commissioner of
the Massachusetts Department of
Public Welfare,
Cross-Petitioner,

v.

GILL PARKER, ET AL.,

and

JOHN R. BLOCK, Secretary of the
United States Department
of Agriculture, .
Cross-Respondents.

APPENDIX TO CROSS-PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Karen FOGGS, et al., Plaintiffs,
Appellees,

v.

John R. BLOCK, Defendant, Appellee.
Thomas Spirito, etc., Defendant,
Appellant.
Karen FOGGS, et al., Plaintiffs,
Appellees,

v.

John R. BLOCK, Defendant, Appellant.

Nos. 83-1270, 83-1320.

United States Court of Appeals
First Circuit.

Argued Sept. 7, 1983
Decided Dec. 7, 1983

COFFIN, Circuit Judge

Defendants, the United States Secretary of Agriculture and the Massachusetts Commissioner of Public Welfare, appeal a judgment of the district court for the District of Massachusetts. The district court held that the defendants deprived the plaintiffs of property without due process of law when they reduced

plaintiffs' food stamp benefits without first providing them with constitutionally adequate notice. The district court ordered restoration of benefits pending provision of adequate notice or recertification of the recipients' files. The court also ordered extensive prospective relief, including the promulgation of new state regulations governing the form of future food stamp notices. We affirm the district court's conclusion that the notice provided by defendants was unconstitutional, but finding that the district court exceeded its authority with regard to remedy, we remand.

In August, 1981, Congress amended the Food Stamp Program, 7 U.S.C. §§ 2011-2029, reducing the earned income deduction from twenty to eighteen percent.

Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 257 (1981). This change required state agencies to include a greater portion of recipients' earned income when calculating benefits, which had the effect of reducing the food stamp entitlement of these recipients. Plaintiffs represent over 16,000 Massachusetts food stamp recipients whose benefits were reduced or terminated in accord with this across-the-board change in federal law.

In late November, 1981, the Massachusetts Department of Public Welfare sent a notice to all food stamp recipients with earned income advising them that their benefits would be reduced or terminated in accord with the statutory change in the earned income deduction. The notice did not indicate the specific

amount of reduction, nor did it indicate the recipient's new benefit amount. The notice, which was dated merely "11/81", also advised recipients that they had a right to request a hearing "if you disagree with this action[,]" and that their benefits would be reinstated if they requested a hearing within ten days. The notice indicated that recipients could appeal by signing and returning a card that was enclosed, or by notifying the Department by phone or in person. The notice was printed in small type across the length of a standard size computer card (approx. 3" X 7"). The notice was printed in English on one side of the card and in Spanish on the other.

Plaintiffs initiated this action in early December, 1981. They challenged the form of the November notice,

alleging that it was incomprehensible to many recipients, that it contained too little information to allow a recipient to determine if a calculation error had been made, and that there was no way for a recipient to know the date by which he had to file an appeal. Contending that any benefit reduction prior to the delivery of constitutionally adequate notice would constitute deprivation of property without due process of law, plaintiffs sought restoration of benefits and other equitable relief. The district court issued a temporary restraining order on December 16, 1981 prohibiting the reduction or termination of benefits based upon the November notice. The Department of Public Welfare subsequently restored the December benefits to prior levels for all recipients with earned income.

In late December the Department sent out a second notice. That notice was printed on two computer cards. One card explained that the November notice was invalid because it had not been properly dated and that benefits had therefore been temporarily restored. That card also discussed recipients' appeal rights. The second card contained a notice virtually identical to that mailed in November, except that it was dated "December 26, 1981".^{1/} Again, the cards were

^{1/} This is a photocopy of the English version of the December notice:

December 26, 1981

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Page 2

MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE

(footnote continued)

(footnote continued)

****IMPORTANT NOTICE - READ CAREFULLY****

RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. UNDER THIS LAW, THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL CITATION: 106 CMR:364.400)

YOUR RIGHT TO A FAIR HEARING

YOU HAVE THE RIGHT TO REQUEST A FAIR HEARING IF YOU DISAGREE WITH THIS ACTION. IF YOU ARE REQUESTING A HEARING, YOUR FOOD STAMP BENEFITS WILL BE REINSTATED AT THE CURRENT AMOUNT IF YOUR APPEAL IS RECEIVED BY THE DIVISION OF HEARINGS WITHIN 10 DAYS OF THE DATE AT THE TOP OF THIS PAGE. IF YOUR APPEAL IS DENIED, THE DEPARTMENT HAS THE RIGHT TO RECOVER FROM YOU ANY ADDED BENEFITS WHICH YOU RECEIVED DURING THE APPEAL PROCESS. YOU MAY STILL APPEAL THIS ACTION AFTER TEN DAYS, BUT YOU MUST DO SO WITHIN 90 DAYS OF THE DATE AT THE TOP OF THIS PAGE. OTHERWISE, YOUR REQUEST FOR A FAIR HEARING AFTER THAT DATE WILL BE DENIED. TO REQUEST A FAIR HEARING, YOU MUST SIGN AND DATE THE ENCLOSED CARD ON WHICH YOUR NAME AND ADDRESS ARE PRE-PRINTED AND MAIL IT TO: DIVISION OF HEARINGS, P.O. BOX

(footnote continued)

printed in English and Spanish. Plaintiffs then filed a supplemental complaint challenging the adequacy of the December notice and sought a second temporary restraining order enjoining any benefit reductions or terminations based upon the notice. The court rejected the motion for a temporary restraining order on December 31, 1981.

In March, 1983, following a two day trial the district court concluded that the December notice was constitutionally inadequate because it failed to provide the recipients with sufficient notice of

(footnote continued)

167, ESSEX STATION, BOSTON, MA 02112. IF YOU HAVE QUESTIONS CONCERNING THE CORRECTNESS OF YOUR BENEFITS COMPUTATION OR THE FAIR HEARING PROCESS, CONTACT YOUR LOCAL WELFARE OFFICE. YOU MAY FILE AN APPEAL AT ANY TIME IF YOU FEEL THAT YOU ARE NOT RECEIVING THE CORRECT AMOUNT OF FOOD STAMPS.

the benefit reduction, was untimely, was incomprehensible to many of the recipients, and did not include financial data for each individual recipient. The district court ordered the Department to restore benefits lost due to the change in earned income deduction. Specifically, the court ordered the Department to restore benefits lost between January 1, 1982 and the date the recipient received adequate notice, had his benefits terminated for a reason unrelated to the change in the earned income deduction, or had his file recertified.^{2/} The

^{2/} Applications for food stamps are approved, or certified, for discrete periods of time known as "certification periods". These periods run from one to twelve months. 7 U.S.C. § 2012(c). At the expiration of the certification period the recipient's entitlement to food stamp benefits lapses. In order to continue to receive benefits the recipient must file a new application and

(footnote continued)

district court also ordered that all future food stamp notices issued by the Department include various data, including the old and new benefit amount, and that the Department issue regulations, subject to court approval, governing the form of future food stamp notices.

On appeal defendants contend that the notice issued by the Department satisfied constitutional requirements and that the district court abused its

(footnote continued)

once again demonstrate eligibility. This process is referred to as "recertification." See Banks v. Block, 700 F.2d 292, 295 (6th Cir. 1983).

The state was not informed by the court that its December notice was inadequate until the district court issued its order on March 24, 1983. By that time the files of all recipients with earned income had been recertified. Thus the practical effect of the district court's order was to require supplementary benefits for the period between January 1, 1982 and the recertification of the recipients' files.

discretion in ordering the restoration of benefits and the promulgation of new notice regulations.

I. Adequacy of Notice

Before applying due process analysis a court must find that there has been a deprivation of life, liberty, or property. Board of Regents v. Roth, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 2705-2706, 33 L.Ed. 2d 548 (1972). The government defendants argue that these food stamp recipients were not deprived of property because they were entitled only to that level of benefits authorized by statute. Since the December reductions merely reduced benefit levels in accord with a statutory mandate, the government argues that food stamp recipients had no further entitlement to the original higher level

of benefits. Observing that recipients had no entitlement to or property interest in the original benefit level after the statutory change, the government concludes that recipients were not deprived of any property when their benefits were reduced and that, therefore, due process analysis is inapplicable to the reduction and termination of these recipients' food stamp benefits.

This argument has some surface appeal but its limitations may best be illustrated by imagining the consequences of its adoption. If no one could claim a property interest or entitlement that in any way exceeded statutory authorization, then very few public assistance recipients would be entitled to the protections of due process. Whenever the government moves to reduce or terminate benefits it

does so because it believes that the recipient has received more than the statute authorizes. Under the government's rationale these recipients would not be entitled to due process because they could claim no property interest in any benefits exceeding those authorized by statute. This situation would, of course, place recipients in an untenable position: the only recipients with a property interest would be those whose reductions exceeded those required by statute, but no one could know who these were if there was no opportunity for notice, objection, and redetermination.

Our own view, placing the argument of the government in proper perspective, is as follows. Public distributive programs are subject to majority action, i.e., Congress, which can increase,

decrease, and terminate benefits. So long as the programs exist, people have the right to participate in accordance with the established ground rules. When it can be said that there is no further right because there is nothing in which to participate, then it must also follow that at that point there is no property interest. To the extent, however, that an individual's right to participate in accordance with preestablished ground rules still exists and that government action may possibly have adversely affected that right to participate, it must follow that there remains a property interest.

Although no other court has explicitly so addressed this question, the notion that statutory reductions infringe a protected property interest appears to

have been uniformly accepted by courts considering statutory modifications in federal public assistance programs. E.g. Garrett v. Puett, 707 F.2d 930 at 931 (6th Cir. 1983) (due process analysis applied to notice announcing statutorily mandated reduction in A.F.D.C. benefits); LeBeau v. Spirito, 703 F.2d 639, 643-44 (1st Cir. 1983) (due process analysis applied to notice announcing statutorily mandated reduction in A.F.D.C. benefits); Banks v. Trainor, 525 F.2d 837, 841 (7th Cir. 1975), cert. denied, 424 U.S. 978, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976) (due process analysis applied to notice announcing statutorily mandated reduction in food stamp benefits); Velazco v. Minter, 481 F.2d 573, 576-78 (1st Cir. 1973) (due process analysis applied to

notice announcing statutorily mandated changes in old age assistance benefits); Philadelphia Welfare Rights Organization v. O'Bannon, 525 F. Supp. 1055, 1058 (E.D. Pa. 1981) (due process analysis applied to notice announcing statutorily mandated reduction in food stamp benefits); Willis v. Lascaris, 499 F. Supp. 749, 755 (N.D.N.Y. 1980) (due process analysis applied to notice announcing statutorily mandated reduction in food stamp benefits). Accordingly, we conclude that the district court properly found that in recalculating the benefits of these food stamp recipients the Department infringed a property interest subject to the full protection of the Fourteenth Amendment.

Having found that the benefit reduction deprived food stamp recipients of

property, the district court proceeded to analyze whether the recipients had been afforded due process. Applying the balancing test first enunciated in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), the court found that the private interest involved, the right to food stamps, is very important; that there was substantial risk of erroneous deprivation owing to the need for an individual determination of each recipient's income and expenses at a time when there was a data processing backlog at the Department's computer facility; that the risk of error was enhanced by the content of the notice, which did not specify the amount of the benefit reduction or whether the benefit was being reduced or terminated; that the notice contained insufficient

information to allow a recipient to determine if an error had been made; that additional safeguards would reduce the risk of error and would be of great value; and that the government's interest in not providing meaningful notice is minimal. Thus the court concluded that the Department had failed to provide recipients with constitutionally sufficient notice.

In reaching its conclusion the court noted not only that the content of the notice was deficient, but that the form of the notice was constitutionally inadequate owing to its unfamiliar language, poor composition, small print, exclusive use of capital letters, and excessive line length. Additionally, the district court found that the Department had failed to comply with the notice

requirements of the Food Stamp Act, 7 U.S.C. §2020(e)(10), and its accompanying regulations, 7 C.F.R. §§273.12(2)(ii) & 273.13(a).

The district court's findings of fact are reviewable only for clear error. E.g., Fed.R.Civ.P. 52(a); Fortin v. Commissioner of Mass. Dept. of Public Welfare, 692 F.2d 790, 794 (1st Cir. 1982). The same standard of review applies in this circuit to mixed questions of law and fact. E.g. Lynch v. Dukakis, 719 F.2d 504 at 513 (1st Cir. 1983); Sweeney v. Board of Trustees, 604 F.2d 106, 109 n. 2 (1st Cir. 1979), cert. denied, 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1980) ("This circuit has applied the clearly erroneous standard to conclusions involving mixed questions of law and fact

except where there is some indication that the court misconceived the legal standards.* (citations omitted)). See Pullman Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); Holmes v. Bateson, 583 F.2d 542, 552 (1st Cir. 1978).

In concluding that the December notice failed to provide constitutionally adequate notice, the district court applied the appropriate legal standard, the Mathews balancing test. Our task, therefore, is limited. We may reverse the district court's conclusion only if our review of the entire record leaves us with the "definite and firm conviction that a mistake has been committed". United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Our review of the record reveals ample support for the court's conclusion that the December notice was difficult to read, relatively difficult to comprehend, ambiguous (in that it indicated only that benefits would be reduced or terminated), and that it lacked the specific information necessary to allow recipients to determine if a calculation had been made. Certainly we find no indication that the court committed clear error.

The district court required the provision of specific notice because it found that there was a high likelihood that recipients' benefits would be miscalculated as a result of the statutory change in the earned income deduction. The government challenges this conclusion, pointing out that the change in benefits was executed by a simple

change in the Department's computer program. The computer was simply instructed to ignore eighteen instead of twenty percent of the recipients' earned income. Since this process did not require the collection or entry of any new recipient data, the government argues it was really the simplest change imaginable.^{3/} As long as the computer was correctly reprogrammed, all of the new benefit amounts would be correct. If the computer was incorrectly reprogrammed, all of the benefits would be wrong.

^{3/} The government distinguished this situation, which merely involved the application of a new calculation formula to pre-existing file data, to an initial determination of eligibility, which involves the collection and verification of new data. The government contends that the risk of error is significant in the latter situation, but not in the former.

Thus the government argues both that the risk of error in this situation is very low, and that any errors that do occur should be obvious. Therefore, the government contends that specific individual notice should not have been required.

While the government's position is appealing in theory, we do not find clearly erroneous the district court's conclusion that there was substantial risk of calculation error. The district court found that the notices were prepared and mailed at a time when there was a significant data processing backlog at the Department's computer facility. As a result of this backlog the files of some recipients did not contain accurate information. The government admits that application of the new calculation

formula to inaccurate data would result in an erroneous benefit payment. The recipients in this case, who were advised only that their benefits would be reduced or terminated, had no way of knowing whether their benefits had been correctly computed or whether an error had been generated by the use of inaccurate or out-dated data. Moreover, this was a very confusing time for many of the recipients owing to concomitant changes in other federal assistance programs. Given these circumstances it was not unreasonable for the district court to conclude that the December notice was inadequate. These recipients may have been well informed about their right of appeal, but they did not have enough information to know whether or not to exercise that right.

The district court's conclusion that the risk of error was significant may have been influenced by the results of a random sample of the files of 5,013 households that received the December notice. That sample revealed that the notice was mistakenly sent to 585 households with no earned income and that the benefits of 211 of these households were erroneously altered. In addition, thirteen other households with earned income received the notice even though their benefits were not affected. We repeat this finding only to demonstrate that a number of errors did occur, the simple ministerial nature of the change notwithstanding.

In affirming the court's conclusion that the December notice was constitutionally inadequate, we stress

the limited scope of our review and the combination of factors and circumstances that prompted the district court to require more specific notice.^{4/} We

^{4/} The government relies on our decisions in LeBeau v. Spirito, 703 F.2d 639 (1st Cir. 1983) and Velazco v. Minter, 481 F.2d 573 (1st Cir. 1973) in arguing that the December notice exceeded constitutional requirements. While those decisions indicate that the requirements of due process are flexible and may vary depending on circumstantial factors, they do not support the notion that due process analysis is inapplicable to the mass change context. In LeBeau this court merely suggested that a notice substantially more specific than that challenged here satisfied constitutional standards. Velazco involved statutory changes to a number of public assistance programs, which resulted in a net increase in benefits. In that situation we indicated that due process required only that recipients receive notification regarding their right to appeal. Our conclusion was influenced by our determination that requiring additional notice would delay implementation of the benefit

(footnote continued).

note, too, that while the court's judgment is consistent with that rendered by other courts faced with challenges to similar notices, e.g., Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976); Philadelphia Welfare Rights Organization v. O'Bannon, 525 F. Supp. 1055 (E.D.Pa. 1981), the court did not go as far as have other courts in requiring specific notice, see, e.g., Dilda v. Quern, 612 F.2d 1055 (7th Cir. 1980), cert. denied sub nom., Miller v. Dilda, 447 U.S. 935, 100 S.Ct. 3039, 65 L.Ed.2d 1130 (1980) (State agency

(footnote continued)

increase. 481 F.2d at 578. The situation presented in this appeal is, of course, quite different and calls for the application of a different standard.

implementing benefit reduction required to supply each A.F.D.C. recipient with a copy of the agency worksheet used to recalculate recipient's benefits).

In addition to finding the notice unconstitutional the district court ruled that "the December notice violated the advance notice requirements of 7 U.S.C. section 2020(e)(10) and 7 C.F.R. section 273.12(e)(2)(ii)". The court also found that the notice had to comport with the requirements of 7 C.F.R. section 273.13(a).

We agree that the notice failed to meet statutory requirements, but find that the notice was not required to comply with the dictates of 7 C.F.R. § 273.13(a). 7 C.F.R. § 273.13(a) requires state agencies to provide individual notice of any "adverse action"

at least ten days before the action will become effective and specifies the information a "notice of adverse action" must contain. But these requirements are not applicable to this food stamp reduction because section 273.13(b)(1) exempts mass change notifications from the requirements of § 273.13(a).

Although these recipients were not entitled to a "notice of adverse action" as that term is defined in § 273.13(a), they were entitled to meaningful advance notice. 7 U.S.C. § 2020(e)(10) implies that advance notice of any benefit reduction is required in the mass change context. The statute explicitly allows state agencies to provide notice "as late as the date on which the action becomes effective" if the benefit reduction

was instigated by the state's receipt of "a written statement containing information that clearly requires a termination or reduction . . . [of] benefits", but it appears to require the provision of advance notice in all other circumstances.^{5/} Any ambiguity in the statute is resolved by 7 C.F.R. § 273.12(e)(2)(ii) which provides, in

^{5/} 7 U.S.C. § 2020(e)(10) provides in part, that:

"[A]ny household which timely requests . . . a fair hearing after receiving individual notice of agency action reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits . . . except that in any case in which the State agency receives from the household a written statement containing information that clearly requires a reduction or termination of the household's benefits, the State agency may act immediately to reduce or terminate the household's benefits and may provide notice of its action to the household as late as the date on which the action becomes effective."

part, that "[a] notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change". The district court found the December notice unconstitutional because the notice failed to convey meaningful information to affected recipients. We believe the notice failed to satisfy statutory requirements for the same reason -- the notice in question failed to inform recipients. We doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement and thus we affirm the district court's conclusion that the

December notice failed to satisfy the notice requirements of 7 U.S.C. § 2020(e) (10) and 7 C.F.R. § 273.12(e)(2)(ii). See Philadelphia Welfare Rights Organization v. O'Bannon, 525 F. Supp. 1055, 1061 n. 7 (E.D.Pa. 1981).

II. Remedy

Finding that the December notice failed to provide constitutionally sufficient notice, the district court ordered the restoration of benefits pending delivery of constitutionally adequate notice, termination of the recipient's participation in the food stamp program for reasons unrelated to the change in the earned income deduction, or expiration of the recipient's certification period. The court also ordered the Massachusetts Commissioner of Public

Welfare to include specified data in future food stamp notices and to draft and submit for approval new regulations governing the form of such notices. We believe the district court erred in ordering such wide ranging relief.

The restoration of benefits to all recipients was unwarranted, given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated. Restoration of benefits would constitute a windfall to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress. Nor would a policy of restoration provide any incentive to state agencies to give adequate notice in the future. Since the federal government

finances the food program (except for 50 percent of the program's administrative costs, which are paid for by the states), states giving inadequate notice would merely find themselves ordered to restore the original, higher level of benefits at the expense of the federal government. State agencies might even find this an attractive possibility, inasmuch as it would have the net effect of temporarily protecting the state's recipients from the effect of statutory benefit reductions. Courts must design remedies that will encourage the states to carry out Congress' intent and provide constitutional notice. A policy of wholesale benefit restoration might frustrate that goal.

Superficially, the most appropriate way to remedy a constitutionally

inadequate notice would be to order the provision of adequate notice. Unfortunately, this solution would not be helpful in the present situation. The state implemented the benefit reduction challenged here in January, 1982. It would be very difficult, if not impossible, to provide the affected recipients with meaningful, understandable notice at this late date. Most likely such a notice, which would have to refer to events and figures almost two years old, would merely confuse recipients.

Rather than require recipients to decipher yet another notice and exercise their right to appeal, we believe it makes more sense to require the Department of Public Welfare to check its files to ensure that the Department properly

calculated the benefit reduction of each recipient with earned income. If the Department finds that a recipient's benefits were improperly recalculated, it should provide the recipient with any benefits due for the period beginning January 1, 1982 and ending on the date the recipient's file was next recertified or the recipient's participation in the food stamp program was terminated for reasons unrelated to the change in the earned income deduction, whichever occurred first.^{6/} The district court

^{6/} The state defendant argues that the district court's order requiring the restoration of benefits violates the Eleventh Amendment's prohibition on the recovery of money damages from the states. Since the cost of the food stamp program is borne by the federal government, we see no Eleventh Amendment bar to ordering the restoration of benefits. The state may incur some administrative costs, if it has to restore benefits, but these should be de minimis.

should ensure that the state's review of its files is thorough and accurate and it may wish to solicit the views of counsel on how this may best be accomplished.

In short, we are substituting this opportunity for review of the Department's calculations for the opportunity a proper notice would have afforded recipients. This procedure, which was suggested as an alternate remedy by the state on appeal, is not a perfect substitute for the provision of constitutional notice. But it will result in the restoration of benefits wrongfully reduced while placing the burden of the state's error on the state where it belongs. At this juncture that appears to be the most we can accomplish.

Although the state's notice was inadequate, we find nothing in the record to indicate that the Department acted in

bad faith. We have no reason to doubt that the state will strive to provide constitutional notice in the future. Indeed, we note that our court has already suggested that the state supplied adequate notice in a very similar situation involving statutory reductions in the Aid to Families with Dependent Children (AFDC) program. LeBeau v. Spirito, 703 F.2d 639 (1st Cir. 1983). Accordingly, we conclude that the district court placed an improper and unnecessary burden upon the Department when it specified the form of future notices and required the submission and promulgation of new notice regulations.

The judgment of the district court is affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. Each party shall bear its own costs on appeal.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1270

KAREN FOGGS, ET AL.,
Plaintiffs, Appellees,
v.
JOHN R. BLOCK,
Defendant, Appellee.

THOMAS SPIRITO, ETC.,
Defendant, Appellant.

No. 83-1320

KAREN FOGGS, ET AL.,
Plaintiffs, Appellees,
v.
JOHN R. BLOCK,
Defendant, Appellant.

ORDER OF COURT

Entered: March 6, 1984

Plaintiff-appellees seek an enlargement of time to file a petition for rehearing from December 7, 1983 to February 10, 1984. This request, over two months after our decision, springs mainly from an arguable inconsistency between our

opinion and that in Levesque v. Block, decided by another panel of our court on December 20, 1983.

Leaving aside the fact that Levesque was handed down seven weeks before the motion was submitted, we see nothing more than a facial similarity between the two cases. In Levesque a prior regulation calling for greater food stamp benefits never having been legally changed (because a replacement regulation was void), retroactive benefits were awarded -- but only until final regulation reflecting a belated comment opportunity was issued. In Foggs, however, the prior level of benefits had been legally lowered by no less authority than an act of Congress. The command of 7 U.S.C. § 2033, never argued to us in brief or oral argument, is to restore them, but in no other case.

As for 7 U.S.C. § 2020(e)(10), requiring advance notice of agency action reducing benefits and continuation of benefits if a fair hearing is requested, we held that this was indeed violated, but that the remedy is not automatic restoration of retroactive benefits to all recipients. Such a remedy would have vastly overreacted to the violation, placing a disproportionate burden on the federal government because of the deficiency of the state, continuing benefits at a rate in excess of that statutorily authorized.

In sum, we see no such manifest miscarriage of law or justice as to impel us to grant this belated motion to enlarge time.

By the court:
Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KAREN FOGGS, ET AL.,)	
Plaintiffs,)	
v.)	CIVIL ACTION
)	NO. 81-0365-F
JOHN R. BLOCK, ET AL.,)	
Defendants.)	

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

March 24, 1983

FREEDMAN, D.J.

This is a motion for a preliminary injunction consolidated with a trial on the merits. Plaintiffs' central claim is that the notice given to the plaintiff class as a result of the Omnibus Budget Reconciliation Act of 1981 was constitutionally insufficient because it did

not contain certain required information and because it could not be understood by the plaintiff class. Defendants' response is that the notice given complies with the requirements of due process.

Based upon my review of the evidence presented by the parties through affidavits and the testimony at the trial, and after careful consideration of the arguments of the parties, both orally and in their memoranda, and with due regard for the proposed order submitted, I am entering the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. The Food Stamp Act of 1977 was amended on August 13, 1981, inter alia, to reduce the earned income disregard for food stamp households from twenty percent to eighteen percent.

2. The Secretary of Agriculture promulgated regulations providing that the changes in the earned income disregard be implemented no later than ninety days from October 1, 1981.

3. At the end of November 1981, the Department of Public Welfare (hereinafter referred to as "the D.P.W.") issued a notice (hereinafter referred to as "the November notice") to 19,654 food stamp households in the State of Massachusetts in an effort to implement the change in the earned income disregard. The notice was written in English and Spanish.

4. The November notice was entitled "IMPORTANT NOTICE--READ CAREFULLY" and informed recipients of changes in the Federal Food Stamp Law. Specifically, recipients were informed that the earned

income deduction was lowered from twenty percent to eighteen percent. The notice contained a citation to the relevant Massachusetts regulations and described the recipients' appeal rights.

5. Recipients could appeal by signing and dating the form enclosed with the November notice and returning it to the address listed on the notice, or by orally requesting an appeal by telephone or in person.

6. On December 10, 1981, plaintiffs commenced this action challenging the legal adequacy of the November notice.

7. On December 16, 1981, this Court certified this action as a class action on behalf of all food stamp households in the State of Massachusetts which received the November notice and issued a temporary restraining order enjoining

any reductions or terminations of benefits based upon said notice. The Court commented that the November notice was deficient in that it failed to provide recipients with a date to determine the time within which they could appeal.

8. As a result of the temporary restraining order, all eligible recipients whose benefits were reduced pursuant to the November notice had their December benefits restored to their previous levels.

9. The D.P.W. restored the recipients' benefits by mailing supplemental benefits (Authorization to Purchase, hereinafter "A.T.P.") to approximately 16,640 recipients in the amount of the December reduction.

10. On or about December 24, 1981, the D.P.W. issued a second notice (hereinafter "the December notice") in English and Spanish dated December 26, 1981 to approximately 16,640 food stamp recipients with earned income. This notice was sent in an effort to implement the change in the earned income disregard by January 1, 1982. The D.P.W. later extended the timely appeal period until January 5, 1982 and notified the recipients of the December notice that their benefits would be reinstated if their appeal was received by that time.

11. The first page or yellow card of the December 26, 1981 notice was entitled "IMPORTANT FOOD STAMP NOTICE, READ CAREFULLY" and it explained to recipients what effect the temporary restraining

order would have on their benefits and their appeal rights.

12. The second page or orange card of the December notice was almost identical to the November notice. It again informed the recipients of the changes in the Federal law with regard to the earned income deductions. The notice again described the recipients' appeal rights.

13. In order to appeal, recipients had to either sign and date the form enclosed with the December notice and return it to the address listed on the notice or to orally request an appeal by telephone or in person.

14. The federal government pays the full cost of all food stamp benefits. The federal government reimburses the State for fifty percent of the State's cost in administering the program.

15. By January 6, 1982, 331 members of the plaintiff class had filed an appeal from either the November or December notices.

16. Appeals filed by January 6, 1982 from either notice were considered timely. Thus, those recipients who filed appeals by January 6, 1982 continued to receive their higher benefits pending appeal.

17. In total, 403 recipients appealed from the November and December notices of reduction.

18. If a recipient filed an appeal after January 6, 1982, the reduction took effect. If, after a hearing, the appeals referee determined that the reduction was improper, benefits were restored back to the date of reduction.

PLAINTIFFS

19. Several members of the plaintiff class testified at trial.

20. Cecelia Johnson, a named plaintiff in this action, was a recipient of food stamps from the D.P.W. on behalf of her two grandchildren in November and December of 1981. Ms. Johnson filed an appeal on December 7, 1981, and a hearing was held on this appeal on January 29, 1982. She received a continuation of the former level of benefits during the pendency of her administrative appeal.

21. Ms. Johnson testified at trial. She has a Bachelor's Degree from Springfield College and a Bachelor's Degree from American International College. She is employed as a mental health worker by the Massachusetts Department of

Mental Health and has been employed in the past as a supervisor with the Division of Employment Security.

On December 2, 1981, Ms. Johnson received the November notice. She testified at trial she was not able to determine after reading the card whether her food stamps were being reduced or terminated so she called her social worker. Ms. Johnson testified that the social worker was unable over the telephone to explain things to her so Ms. Johnson went to see her in person. Ms. Johnson did not find out from visiting the social worker in person whether her food stamps were being reduced or terminated.

A few days after receiving the November notice, Ms. Johnson received another notice from the D.P.W. informing

her that her food stamps were going to be reduced because her income had changed when, in fact, her income had not changed. Later in December of 1981, Ms. Johnson received the December notice in question. Upon receipt of the December notice, Ms. Johnson read it. She testified that she found it difficult to read because of the referencing on page 1 to page 2. She testified she was unable to understand the notice.

Ms. Johnson filed an appeal from the November and December notices and a hearing was held on January 29, 1982. Following the hearing, the appeals referee rendered the decision voiding any reduction or termination of Ms. Johnson's food stamp benefits.

22. Plaintiff Gill Parker is and was in December of 1981 a recipient of food stamps, and he testified at trial. Mr. Parker completed the eleventh grade in school. He is not regularly employed although he is, on occasion, utilized by the Springfield Public Library as a game technician. In December 1981, Mr. Parker received the December notice and was not able to understand it after reading it several times. Mr. Parker testified he had to resort to the use of a magnifying glass to read the print.

23. Plaintiff Gill Parker filed an appeal on December 9, 1981. His benefits were not reduced as a result of the challenged notices. Prior to receiving notices, Mr. Parker was receiving \$72.00 in food stamp benefits, and after his recertification in December 1981, Mr.

Parker began receiving \$106.00 in food stamp benefits.

24. Stephanie Zades, a plaintiff in this case, was a recipient of food stamp benefits from the D.P.W. in December 1981. Ms. Zades is a high school graduate and was employed as a manager of the Electronics Department for Child World. In late December 1981, Ms. Zades received the December notice in the mail. Ms. Zades testified that she tried to read the December notice but only got part way through because the print was too small for her to be able to read it and because it was so confusing she could not understand it. Ms. Zades testified she called her social worker at the D.P.W. but the social worker was of no help. Ms. Zades then sought legal assistance regarding

the notice, and on advice of counsel, filed an appeal.

25. Ms. Zades filed an appeal on January 5, 1982. A combined hearing on Zades' food stamp reduction and A.F.D.C. proposed termination was held on February 25, 1982. The D.P.W. appeals referee ordered the D.P.W. to determine if Zades received the proper amount of food stamp benefits during the period November 1981 through February 1982, and if a loss occurred, to restore the benefits. Following the hearing, the food stamp benefits lost to Ms. Zades based on the December notice were to be restored to her.

26. Plaintiff Madeline Jones is and was in November and December of 1981 a recipient of food stamps from the D.P.W. Ms. Jones is 62 years old and a high

school graduate. She is employed on a part-time basis as a Senior Aide in the Assessing Department of the City of Boston.

27. In early December 1981, Ms. Jones received the November notice. She was unable to understand this notice so she filed an appeal. In late December 1981 or early January 1982, Ms. Jones received the December notice. On February 22, 1982, Ms. Jones had her hearing concerning the November and December notices and in March 1982, she received a decision denying her appeal.

COMPREHENSIBILITY

28. Readability studies consist of quantitative statistical formulas and qualitative analysis. These are used to predict the reading difficulty of a given written passage.

29. The Dale-Chall and Fry tests analyze the reading difficulty of a given passage in terms of a reading grade level score, which is not the same as actual grade placement.

30. For example, a grade level score of 5-6 for a given passage indicates that students who tested at the fifth or sixth grade levels on a standardized reading test can answer correctly approximately seventy-five percent of the multiple choice questions put to them on that passage. Thus, a grade level score does not indicate total comprehension. Further, people who read at a fifth or sixth or grade level may have completed fewer or more than that number of years of school.

31. Using the Dale-Chall formula analysis, page one of the December

notice tested objectively at a reading grade level of 9-10 and page two of that notice tested objectively at a grade reading level of 11-12.

32. The most widely used reading formula, the Dale-Chall test, is a two-prong test based upon a list of three thousand so-called "familiar" words known in reading by at least eighty percent of children in the fourth grade in 1948, and average sentence length.

33. All words in a given reading sample not appearing on the Dale list of familiar words are considered unfamiliar. The same unfamiliar word is counted each time it appears in a given example. The number of unfamiliar words is a key factor in determining the level of difficulty of a given passage using the Dale-Chall test.

34. Dr. Culliton, defendants' expert, applied the Dale-Chall reading formula to page one of the December notice (yellow card) and determined it had a readability level of between eighth and tenth grade.

35. Dr. Conard, plaintiffs' expert, applied the Dale-Chall reading formula to page one of the December notice (yellow card) and determined that it had a reading ability level of between ninth and tenth grade.

36. Dr. Culliton applied the Dale-Chall reading formula to page two of the December notice (orange card) and determined that it had a readability level of between ninth and tenth grade.

37. Dr. Conard applied the Dale-Chall reading formula to page two of the December notice (orange card) and

determined that it had a readability level of between eleventh and twelfth grade.

38. Included in the list of unfamiliar words, and therefore influencing the reading level predicted by the Dale-Chall test for page two of the December notice are the following: within, division, recent, federal, benefit, benefits, eligibility, eligible, appeal, reduced, reduction, deduction, request, action, local, welfare, percent, disagree, terminated, computation, contact, enclosed, current.

39. Using the Fry Graph analysis, page one of the December notice tested objectively at a reading grade level of eleven and page two of that notice tested objectively at a reading grade level of twelve.

40. Using the Flesch formula, page one of the December notice tested objectively as fairly difficult (like a quality magazine) and page two of that notice tested objectively as difficult (like an academic journal).

41. Using the Fogg formula analysis, page one (yellow card) of the December notice tested objectively at a reading grade level of 15.2 and page two (orange card) of that notice tested objectively at a reading grade level of 14.4.

42. Each of the class members who appeared before the Court testified that they were confused by the fact that the November notice did not say whether their benefits were to be reduced or terminated. The December notice contained the same language.

43. Based on information retrieved from the United States Census Bureau's 1976 Survey of Income and Education, the most recent and accurate information of its kind available, 45.8 percent of all heads of Massachusetts food stamp households with earned income have not completed high school.

44. Based on United States Census Bureau figures from the 1976 Survey of Income and Education, 82.2 percent of all heads of Massachusetts food stamp households with earned income have a twelfth grade education or less.

45. Among all Massachusetts food stamp households, 50.2 percent of the heads of those households have not completed high school.

46. Among all Massachusetts food stamp households, 81.7 percent of the

heads of those households have a twelfth grade education or less.

47. Dr. Conard, plaintiffs' expert, and Dr. Culliton, defendants' expert, were in agreement that qualitative or subjective factors have to be taken into account in arriving at a meaningful conclusion regarding the difficulty level of a given written passage.

48. The reader's background, interest, and motivation in the subject matter play an important role in determining comprehensibility.

49. Those readers who have no interest or background in the subject of certain reading material may find little meaning in it; for other readers who were interested in the subject, the same material may be most comfortable reading. This difference in ease of reading and

comprehension may exist even though both groups of readers have completed the same years of schooling and have the same general reading ability on a standardized reading test.

50. In Dr. Conard's qualitative analysis of the challenged notices, she determined that the following words were critical to the understanding of the notices: A.T.P., benefits, appeal, certification, recertified, federal, percent, denied, division, department, welfare, requests.

51. Dr. Bendick, plaintiffs' expert, testified that the following words or phrases contributed to the difficulty of the notices: "Your right to a fair hearing," "reinstated," "the earned income deduction has been lowered from 20 percent to 18 percent," "terminated," and "appeal is denied."

52. All food stamp households must have an interview with a D.P.W. caseworker prior to initial certification and at all recertifications.

53. As part of the interview process, the caseworker must fully advise households of their rights and responsibilities under the Food Stamp Program.

54. Households are recertified at various intervals from three months to one year.

55. At the initial certification, and all subsequent recertifications, households must complete an "Application Form." Contained in the application form are the words action, apply, eligible, benefits, deductions, information, fair hearing, disagree, hearing, eligibility.

56. At the time of certification and all recertification, households are given a "change of report form." Contained in the change of report form are the words eligible, received, deductions, benefits, fair hearing.

57. Prior to the end of a certification period, households receive a "notice of food stamp termination form" explaining that they must reapply for benefits and of their right to request a fair hearing. Contained in the notice of food stamp termination form are the words termination, eligible, eligibility, department, welfare, fair hearing, benefits.

58. After a household has been recertified, it receives a notice entitled "notice of eligibility/recertification" which explains in detail the households'

appeal rights using much of the same terminology contained in the challenged notice. The words certify, recertification, A.T.P., fair hearing, appeal, eligible, eligibility, department, welfare are contained in this notice.

MULTI-LINGUAL NOTICE

59. The challenged notices were written in English and Spanish.

60. It is not known how many members of the plaintiff class do not understand English or Spanish but there is at least one.

LEGIBILITY

61. The December notice was typed on a standard office typewriter, then photoreduced to approximately one half that size and printed on orange and yellow stock cards.

62. Standard office typewriters generally use either pica or elite type. Pica is ten points; elite is twelve points. A point is equal to 1/72 of an inch.

63. The December notice was photo-reduced so that the size of the print on the card was equivalent to between 6 points and 5.75 point type which is between 2 to 5 points smaller than the type size generally considered acceptable for text copy.

64. The length of the lines in the December notice are from two to three times longer than that which is considered acceptable for text copy.

65. There was no extra spacing between the lines of print on the December notice. Considering the size of the point used and the line length, there

should have been two points of additional line spacing. The spacing between the letters on the December notice was inconsistent and overlapping due to the fact that the notice was produced by photoreducing typewriter copy.

66. Only the English language version of page one of the December notice was printed in capital and lower case letters, while the Spanish language version of page one and both versions of page two of the notice were printed in all capital letters.

67. The production quality of the December notice includes the following: page one is overinked, creating black spots in the text, while page two is underinked, resulting in a grey copy.

68. The December notice was printed in sans serif type.

CONTENTS

69. The December notice did not apprise its recipients of what their food stamp benefit amount was prior to the proposed action that was to be taken.

70. The December notice did not apprise its recipients of what their new food stamp benefit amount would be after the proposed action was taken.

71. The December notice did not notify its recipients of the amount of earned income that the D.P.W. was utilizing in recalculating their food stamp benefits.

72. Without being given the old food stamp benefit amount, the proposed new food stamp benefit amount and the amount of earned income utilized by the D.P.W. to recalculate the food stamp benefits, recipients of the December notice could

not determine whether or not a mistake had been made in their individual cases.

73. The December notice did not tell recipients whether their benefits were being reduced or being terminated.

ADMINISTRATIVE CONSIDERATIONS

74. The D.P.W. was notified in September 1981 by the United States Department of Agriculture ("U.S.D.A.") that major changes in the Food Stamp Program and the A.F.D.C. Program would have to be in effect by October 1, 1981. The U.S.D.A., however, permitted a December 1, 1981 implementation for the Food Stamp Program changes.

75. There are groups of at least 100 food stamp households within specific food stamp individual certification office areas which speak the same non-English language, which do not contain

an adult fluent in E.S.L. and whose primary non-English language is one of the following: Armenia, Chinese, French (Haitian), Greek, Italian, Polish, Portugese (Cape Verdian), Russian, Spanish, or Vietnamese.

76. The Food Stamp Program changes required the development of new D.P.W. policies, procedures, and regulations.

77. Massachusetts change notices are issued by a computer within the Bureau of Systems Operation ("B.S.O."). The B.S.O. is a state agency separate from the D.P.W.

78. The B.S.O., a division of the Massachusetts Department of Administration and Finance, provides all of the systems and operations for the D.P.W., including computer operations and computer programming.

79. Included within the systems and operations provided by the B.S.O. for the D.P.W. is the computer programming required for the generation of food stamp A.T.P.'s and notice address cards as well as various reports concerning the operation of the Food Stamp Program, including the 902 reports.

80. On October 29, 1981, the B.S.O. received a formal written request from the D.P.W. to modify the computer programs to implement a change in the earned income disregard effective with the December A.T.P.'s.

81. In November 1981, there was a shortage of B.S.O. computer programmers. In addition, during that time, B.S.O. was involved in three other major projects.

82. If, in its formal written request to B.S.O. to implement the earned income disregard change, the D.P.W. had indicated that it wanted B.S.O. to program the computer to include on the address slip the affected household's old benefit amount, new benefit amount, and earned income amount, it is likely the B.S.O. would have been able to program the computer to do so without causing any delay in the date on which the earned income disregard changes became operational or in the date by which the notices of that change were mailed out.

83. On or about December 18, 1981, the B.S.O. received a verbal request from the D.P.W. to program the computer to generate supplemental A.T.P.'s reinstating the food stamp benefits to all households which were adversely affected by the November notice. As

part of this D.P.W. request concerning the issuance of supplemental A.T.P.'s, the D.P.W. also asked the B.S.O. to generate a set of address slips for the December notice, which was to be sent to all households receiving supplemental A.T.P.'s. The D.P.W. did not ask the B.S.O. to include on that address slip the affected household's old benefit amount, new benefit amount, or earned income amount.

84. If, at the time the D.P.W. asked the B.S.O. to generate the A.T.P.'s and address slips, the D.P.W. had asked the B.S.O. to include on the address slips the affected household old benefit amount, new benefit amount, and earned income amount, it is likely the B.S.O. would have been able to do so without any delay in the date by which the

supplemental A.T.P. notices were sent. Programming the computer to provide individual information concerning a household's change in food stamp benefits is neither a difficult nor burdensome process.

85. It is administratively feasible to draft notices of reduction and termination in public assistance programs at a fifth-sixth reading grade level.

86. A notice of change in benefit amounts that provides the old benefit level, the new benefit level, a precise statement of the reason for the nature of the change, and sufficient information to allow its recipient to determine whether the proposed action is correct operates to benefit the agency because such a notice should reduce the amount of client visits and phone calls to the

agency seeking clarification, reduce the amount of unnecessary appeals, and free up the time of the caseworkers for other tasks.

87. It is unclear whether the D.P.W. caseworkers were able to provide clients with explanations of either the November or December notices.

ERROR RATE

88. The defendants set forth that the approximate error rate for the issuance of food stamp benefits is 13 percent. Of the 13 percent, approximately 11 percent are overpayments to recipients, and 2 percent are underpayments.

89. Approximately 16,000 food stamp households were sent the December notice.

90. The specific earned income of a given household was a factor in

determining the amount of that household's benefit reduction as a result of the change announced in the December notice.

91. Of approximately 16,000 households sent the December notice, 9,191 were participants in the monthly income reporting system ("M.I.R.S.").

92. The computer utilized by the B.S.O. for the implementation of the earned income disregard change and the issuance of food stamp A.T.P.'s received the raw data on those households participating in the M.I.R.S. directly from the M.I.R.S. computer via a magnetic tape.

93. In October, November, and December 1981, there was a backlog in the M.I.R.S. data entry system.

94. Approximately two thirds of all data entries scheduled for the M.I.R.S. in October were not processed and the backlog was not corrected until the last week in December 1981.

95. For any of the 9,191 M.I.R.S. food stamp households which reported any change in their household circumstances including changes in income in October or November 1981, it was more likely than not that the information was not entered into the M.I.R.S. computer and, therefore, was not transmitted to the B.S.O. computer prior to the implementation of the change in the earned income disregard.

96. If a reported change in family circumstances which affects the household food stamp benefits is not entered on a timely basis into the M.I.R.S.

computer, the A.T.P. issued by the B.S.O. computer will be in error.

97. Because of the substantial data entry backlog in the M.I.R.S. in October, November, and December 1981, the likelihood of error with respect to any M.I.R.S. household affected by the change in the earned income disregard was increased.

98. The computer which the D.P.W. utilized to implement the change in the earned income disregard generated a 902 C Report listing each food stamp household which received the December notice.

99. For each household which received the December notice, the 902 C Report listed that household's name, address, old food stamp benefit amount, new food stamp benefit amount, and earned income.

100. The 902 C Report contained approximately 16,000 food stamp households.

101. A random sample of 5,013 of the approximately 16,000 cases listed on the 902 C Report showed 585 cases in which a household was listed as having no earned income.

102. Of the 585 households in the random sample with no earned income, 211 were listed as experiencing a change in benefits.

103. The random sample of 5,013 cases shows that 13 households in the sample were listed as having earned income but no changes in benefits.

104. Therefore, according to the random sample of the 902 C Report, there were 585 cases with no earned income, 211 cases with no earned income but with

a change in benefits, and 13 cases with earned income but no change in benefits.

105. The random sampling of the 902 C Report only identified errors which logically flowed from the fact that the reductions or terminations of benefits were based upon a change in the earned income disregard.

106. A separate 903 Error Report was issued by the Bureau of Systems Operation identifying those food stamp cases which the computer was not able to adjust due to missing information or information which was not allowed in computer calculation. Those households identified on the 903 Error Report did not receive the challenged notices; they received notices mailed out by case-workers.

107. It was error for the D.P.W. to send the December notice to the 585

households in the sample with no earned income, to change the benefits of the 211 households with no earned income, and to send the December notice to 13 households in the sample with earned income but no change in benefit level.

108. Any time the D.P.W. determines that a household has not received the total benefits to which it was entitled during the preceding twelve months, the D.P.W. recalculates the benefits and restores to the household any lost benefits.

109. At the time of trial, all but 193 members of the plaintiff class had been recertified or had their cases closed.

110. By the end of December 1982, all members of the plaintiff class who had had their cases recertified were closed and their benefits redetermined

because the longest period of certification is twelve months.

CURRENT D.P.W. PROCEDURES WITH RESPECT TO MASSACHUSETTS CHANGE NOTICES

111. All Massachusetts change notices under the Food Stamp Program currently have the old household's benefit amount and new benefit amount on the name and address card.

112. The D.P.W. now sends with all Massachusetts change notices under the Food Stamp Program, a multi-lingual card in eight languages stating:

IMPORTANT NOTICE! HAVE TRANSLATED IMMEDIATELY.

II. CONCLUSIONS OF LAW

1. Pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, this Court ordered the consolidation of the hearing on plaintiffs' motion for a

preliminary injunction with the trial of the action on the merits, and treated the motion for a preliminary injunction as a request for a permanent injunction.

2. Plaintiffs' central claim is that the notice provided to the plaintiff class did not comport with the due process requirements of the Fourteenth Amendment to the United States Constitution.

3. In determining the merits of the plaintiffs' procedural due process claim, a court must make two inquiries. First, it must determine whether the plaintiffs have been deprived of a property interest which is entitled to Fourteenth Amendment protection. Second, once a constitutionally protected property interest has been identified, it must be determined what process is due.

4. It is clear that the entitlement to food stamp benefits is a property interest subject to the full protection of the Fourteenth Amendment. Goldberg v. Kelly, 397 U.S. 254 (1970). Therefore, given the existence of a constitutionally protected property interest, the question is what process is due.

5. In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court set forth three factors that should be considered by any court determining what administrative procedures are constitutionally sufficient: (1) the private interests that will be affected by the official action; (2) the risk of any erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the

Government's interests including any fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

6. Addressing the first of the three factors outlined in Mathews, supra, I find the private interests of the plaintiffs which are affected to be extremely significant ones. Food is a necessity of life, and the purpose of the food stamp program is to provide low-income households with the resources to purchase a minimally adequate supply of food. 7 U.S.C. Section 2011; United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973). Because accurate calculations enable persons who are on the margin of subsistence to obtain a minimally adequate diet; by definition, a miscalculation of even a portion of the household food stamp

allotment would leave the household with insufficient resources to procure the necessities of life. The slightest change in the household food stamp allotment threatens the well-being and dignity of its members. Willis v. Lascaris, 499 F. Supp. 749 (N.D. N.Y. 1980); Goldberg v. Kelly, 397 U.S. 254 (1970).

7. Next, the risk of an erroneous deprivation of benefits flowing from the reductions and terminations announced in the December notice must be considered, along with the probable value, if any, of additional or substitute procedural safeguards.

8. The calculation of food stamp benefits under the income method requires an individualized determination of income, expenses, and deductions for each

recipient. This type of calculation creates substantial risks of erroneous deprivation. Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); Willis, 499 F. Supp. at 757.

9. In the case at hand, there was confusion in the D.P.W. and the B.S.O. during the latter part of 1981 when the massive changes were being implemented, and there was a substantial data entry backlog in the M.I.R.S. in the months of October, November, and December of 1981. These problems increased the likelihood of error.

10. As a result of a random sampling of households which received the December notice, several errors were discovered. It was error for the D.P.W. to send the December notice to 585 households in the sample with no earned income, to change

the benefits of 211 households with no earned income and to send the December notice to 13 households in the sample with earned income but no change in benefit level.

11. The risk of erroneous deprivation of benefits is increased in this case by the lack of adequate notice. The December notice did not inform the affected food stamp households of the exact action being taken, that is, whether their food stamp allotment was being reduced or terminated. There was no mention of the amount by which the benefits were being reduced. And finally, the December notice lacked the information necessary to enable the household to determine if an error had been made. Therefore, without the relevant information to determine whether an error had

been made, the risk of an erroneous deprivation is increased.

12. The probable value of additional or substitute procedural safeguards in the case at hand is great. If the recipients were provided with sufficient individual information to determine if an error had been made, it would allow each recipient to correct any errors prior to suffering a deprivation. See Philadelphia W.R.O. v. O'Bannon, 525 F..Supp. 1055 (E.D. Pa. 1981).

13. It is unclear from the record the possible monetary loss to those households affected by the December notice. However, since the inquiry involves food stamp benefits, even if the implementation of the act involved only a slight change in food stamp allotments, this change affects the household's

ability to procure an amount of food which has been determined to be minimally adequate. Therefore, any reduction in a minimal subsistence level is significant.

14. The next factor to be considered is the government's interest in not providing an adequate notice. Generally, the government's interest in a case such as the case at hand is the conservation of scarce fiscal and administrative resources. Although administrative cost and convenience is not the controlling weight in determining whether or not due process requires a procedural safeguard, it is a factor that must be weighed. Mathews v. Eldridge, 424 U.S. 319 (1976). However, in the case at hand, the Commonwealth does not argue the conservation of scarce fiscal

resources but rather sets forth the administrative problems existing at the time of the implementation of the Omnibus Budget Reconciliation Act in Massachusetts. The Commonwealth argued that there was a shortage of B.S.O. computer programmers in November of 1981, and during that time, the B.S.O. was involved in three major other projects. The defendants do not argue that the cost of making a constitutionally adequate notice is overwhelming, but rather argue that it was not administratively possible at the time the notices were sent to make a constitutionally adequate notice.

15. I find the defendants' argument of time pressure neither persuasive nor controlling. First, Massachusetts negotiated a time extension from the

federal government so that the change in the earned income disregard would not have to be implemented until December 1, 1981. Furthermore, the explicit federal regulations issued on September 4, 1981 stated that the earned income disregard payments need not be implemented before January 1982. It seems that the time pressures that the D.P.W. felt regarding the November notice were self-created. This Court imposed no time constraints on the issuing of the December notice.

16. The governmental interest in not providing an informative notice is minimal at best. I cannot see any real hardship to the defendants in requiring that an informative and clear notice of the reduction or termination of food stamps be given to the plaintiff class. The provision of an informative notice

would actually benefit the Commonwealth as meaningful errors will be brought to its attention. The appeals taken from the December notice could not possibly be the result of discovered errors.

17. In the balance, I hold that the notice given by the Commonwealth is constitutionally deficient. The private interest of each individual recipient is significant, the risk of erroneous deprivation is high with the probable value of additional procedural safeguards great, and the government's interest is minimal.

18. Due process is flexible and calls for such procedural protection as the particular situation demands. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

19. In Mullane v. Central Hanover Trust Company, 339 U.S. 306 (1950), the court declared that in order to comply with the strictures of the Constitution, a "notice must be of such nature as reasonably to convey the required information" "[t]he means employed must be such as one desirous of actually informing the [recipient] might reasonably adopt to accomplish it." Id. at 315.

20. The nature of the language and the format of the notice was not reasonably designed to convey the information contained. Although food stamp recipients are generally familiar with the terms used in the notice, the composition of the notice made it very difficult to understand especially considering the education level of most recipients.

Furthermore, the very small print, the use of capitals and line lengths served to increase the difficulty of reading and understanding the December notice.

21. Moreover, the December notice did not inform the affected food stamp households of the exact action being taken, or the amount by which their benefits were being reduced, and it did not provide the information necessary to enable the household to determine if an error had been made. The notice of reduction or termination of need-based public assistance benefits must, at a minimum, inform the recipient of the actual amount of the benefits being taken away and the relevant information necessary to ascertain whether an error has been made. Philadelphia W.R.O. v. O'Bannon, 525 F. Supp. 1055, 1060-61

(E.D. Pa. 1981). In the case at hand, the recipients were not even informed whether they were being terminated or reduced.

22. The December notice violated the timely advance notice requirements of 7 U.S.C. Section 2020(e)(10) and 7 C.F.R. Section 273.12(e)(2)(ii).

23. The notice required to implement the change in the earned income disregard had to comport with the requirements of 7 C.F.R. Section 273.13(a).

An appropriate Order shall issue.

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KAREN FOGGS, ET AL.,

Plaintiffs,

v.

JOHN R. BLOCK, ET AL.,

Defendants.

CIVIL ACTION
NO. 81-0365-F

ORDER

March 24, 1983

FREEDMAN, D.J.

This matter is before me on plaintiffs' motion for a preliminary injunction consolidated with a trial on the merits. Based upon my review of the evidence presented by the parties through affidavits and the testimony at the trial, and after careful consideration of the arguments of the parties, both orally and in their memoranda, and in

accordance with the Findings of Fact and Conclusions of Law of even date, I am issuing this Order.

1. It is hereby declared that the December notice did not comport with the constitutional requirements of due process because:

a. It did not contain the individual recipient's old food stamp benefit amount, new benefit amount, or the amount of earned income that was being used to compute the change;

b. It did not tell its recipients whether they were being reduced or terminated;

c. It was written at such a level of difficulty and in such a format as to be incomprehensible to many of its recipients; and

d. It was not timely.

2. Defendants are hereby ordered to return forthwith to each and every household in the plaintiff class all food stamp benefits lost as a result of the action taken pursuant to the December notice for the period between January 1, 1981 and the earliest of the following:

a. The month next following the date the household was recertified for participation in the food stamp program;

b. The date the household was terminated or withdrew from participation in the food stamp program for reasons not related to the change in the earned income disregard; or

c. The date that the household receives a legally sufficient notice regarding the change in the earned income disregard.

3. Defendant Spirito is hereby ordered to draft and issue regulation(s) containing specific standards to ensure that all future food stamp notices of reduction or termination are written and printed so as to be understandable to recipients of those notices, provided however that:

a. Such regulation(s) be drafted and submitted to this Court (upon notice to plaintiffs' counsel) for approval within forty-five days of entry of judgment herein; and

b. The regulations shall not be issued prior to approval by the Court.

4. It is hereby declared that all food stamp notices of reduction or termination of benefits must be mailed at least ten days before the proposed action and must contain at least an explanation

of the reason and the specific citation for the proposed action, the benefit amount after the proposed action, and sufficient information to allow the recipient of such a notice to determine whether an error has been made.

5. Defendant Spirito is hereby enjoined from reducing or terminating the food stamp benefits of any household participating in the food stamp program without first sending to that household at least ten days before the proposed action, a notice that includes at least:

a. An explanation of the reason for the proposed action;

b. The specific citation that supports the proposed action;

c. The benefit amount prior to the proposed change;

d. The benefit amount after the proposed change;

e. Sufficient information to allow the recipient to determine whether an error has been made; and

f. The effective date of the proposed action.

6. It is hereby declared that the December notice violated the provisions of 7 C.F.R. Section 272.4(c)(3) because it was mailed out only in English and Spanish.

7. It is hereby declared that the current multi-lingual notice card being used by defendant Spirito as an insert in certain food stamp notices does not comport with the requirements of 7 C.F.R. Section 272.4(c)(3)(ii)(B) because it does not contain:

a. All of the languages currently required for food stamp notices in Massachusetts; and

b. A summary of the purposes of the notices it accompanies; and

c. A telephone number to call for more information.

8. Defendant Spirito is hereby enjoined from terminating or reducing the food stamp benefits of any household that is a member of a single-language minority entitled to notice in its native language pursuant to 7 C.F.R. Section 272.4(c)(3)(i) or (ii) unless that household is provided with a notice in its native language that comports with the requirements of 7 C.F.R. Section 272.4(c)(3)(ii)(B).

9. It is hereby declared that plaintiffs are the prevailing party in this

action and are entitled to an award of attorneys' fees pursuant to 42 U.S.C. Section 1988; the amount thereof to be determined by the parties, or by this Court upon appropriate motion therefor to be filed within sixty days of entry of judgment herein.

It is So Ordered.

United States District Judge

OPPOSITION BRIEF

MAY 14 1984

ALEXANDER L. STEVENS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO. 83-1660

CHARLES M. ATKINS, Commissioner of
the Massachusetts Department of
Public Welfare,

Cross-Petitioner,

v.

GILL PARKER, ET AL.,

and

JOHN R. BLOCK, Secretary of the
United States Department
of Agriculture,

Cross-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE COURT
OF APPEALS FOR THE FIRST CIRCUIT

May 11, 1984

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REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THE COURT OF APPEALS FOUND THAT THE CHALLENGED NOTICE VIOLATED THE FOOD STAMP ACT, THUS RENDERING REVIEW OF ITS CONSTITUTIONAL ANALYSIS UNNECESSARY AND INAPPROPRIATE

The state defendant argues that the opinion of the court of appeals in Foggs v. Block, 723 F.2d 933 (1st Cir. 1983), should be reviewed and reversed because the courts below allegedly misapplied the test enunciated in Matthews v. Eldridge, 424 U.S. 319 (1976), when reaching the conclusion that the challenged food stamp notice did not comport with the requirements of due process. While the plaintiffs would, were it necessary, certainly dispute the defendant's contention, the current case does not properly raise this issue. This is so because the defendant has overlooked the fact that both lower courts made independent findings that the notice at issue also violated the specific requirements of the Food Stamp Act, 42 U.S.C. §2020(e)(10). Appendix, pp. 31 and 98, ¶22.^{1/} In light of such findings, this case

^{1/} For the convenience of the Court, all references to the Appendix will be to the one submitted by the state defendant with his Cross-Petition for a Writ of Certiorari and will be hereafter designated A__.

does not constitute a proper vehicle for the broad-based constitutional analysis in which the defendant would have the Court indulge.

The case of Califano v. Yamasaki, 442 U.S. 682 (1979), directly addresses both the propriety of unnecessary constitutional review and the soundness of the statutory analysis applied by the court of appeals in this case. In Califano, supra at 692-693, the Court noted that "a reluctance when conscious of fallibility to speak with our utmost finality, [citation omitted] counsels against unnecessary constitutional adjudication." In the current case, given the finding of the court of appeals that the notice violated the Food Stamp Act because it "failed to convey meaningful information to affected recipients" (A 31), review of the due process analysis undertaken below would certainly constitute the "unnecessary constitutional adjudication" that this Court has said should be avoided.

Further, Califano v. Yamasaki, 442 U.S. at 693, states that "this Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary." This assumption also influenced the court of appeals in concluding that Congress did not intend that a notice that "failed to convey meaningful information" would comport with the requirements of 42 U.S.C. §2020(e)(10).

Thus, the only possible mistake that the court of appeals may have made in this regard was to consider the constitutional issue at all in light of its conclusion that the challenged

notice violated the Food Stamp Act. The state defendant would have this Court do likewise, but Califano v. Yamasaki counsels that it should not.

POINT II

THE LOWER COURTS' RELIANCE ON EXPERT TESTIMONY WAS PERFECTLY APPROPRIATE

The state defendant's second argument appears to be that the trial court gathered too much evidence in seeking to establish whether the challenged notice was reasonably calculated to provide the required information. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). He suggests that determining the suitability of a notice to its intended audience somehow trivializes the concept of due process. But he does not seem to dispute that a notice could be so incomprehensible to its intended audience (e.g., a Russian language notice sent to the class involved here), or so illegible (e.g., black ink on black paper) as to render it no notice at all. Consequently, his argument is not really with the method of analysis undertaken by the district court, but simply with the result of that analysis. The court of appeals, however, found "ample support for the court's conclusion that the December notice was difficult to read, relatively difficult to comprehend, [and] ambiguous..." (A 21). Concluding that such a notice does not comport with the minimum standards articulated in Mullane certainly constitutes no departure from the teachings of this Court.

Consequently, it can be seen that the defendant has constructed a novel theory for review of a lower court decision. While innumerable appeals are premised upon the contention that the trial court possessed too few facts from which to reach its ultimate conclusion, the defendant may be the first appellant with the temerity to complain that the trier of fact gathered too much information in rendering his final decision. Such a position is very nearly frivolous, and certainly provides no basis for this Court's review of the perfectly appropriate fact-gathering undertaken by the district court in this case.

POINT III

GIVEN THE FINDING OF A STATUTORY VIOLATION,
IT IS UNNECESSARY TO ADDRESS THE STANDARD
OF REVIEW IN THIS CASE

The final argument presented by the state defendant is that the court of appeals erred in not independently reviewing the factual findings of the district court. He contends that a long line of decisions from this Court authorize independent appellate factual review when determining constitutional issues. There are two flaws in this contention. First, as noted earlier in Point II, the court of appeals did in fact review the record and found "ample support" for the district court's conclusions before commenting that "[c]ertainly we find no indication that the court committed clear error." (A 21). Thus, the court of appeals indicated that the factual premises of the lower

court's decision could withstand whatever degree of scrutiny might be applied to them.

The second problem with the defendant's analysis is that it again overlooks the fact that both lower courts found that the notice at issue here violated the Food Stamp Act. As such, this is not a case in which this Court, or the court of appeals, is properly reviewing a constitutional determination. Rather, the relevant violation is statutory in nature, Califano v. Yamasaki, 442 U.S. 682 (1979), and therefore the standard of review set forth in Pullman-Standard v. Swint, 456 U.S. 273 (1982), is the appropriate one to be utilized.

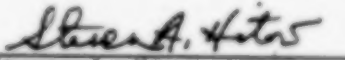
Consequently, even if it would have been inappropriate for the court of appeals to refuse to review the factual findings of the district court with regard to the due process issues decided below, that claim is not grounds for review by this Court; both because the appellate court did in fact inspect the district court's findings and because the independent statutory violation provided the basis for review pursuant to the "clearly erroneous" standard. Thus, any confusion on the part of the court of appeals with regard to the appropriate standard merely represented, at worst, harmless error.

CONCLUSION

For the reasons set forth above, the state defendant's Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Dated: May 11, 1984


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CERTIFICATE OF SERVICE

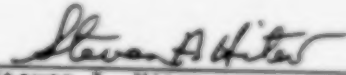
I, Steven A. Mitov, certify that I served the Brief in Opposition to Cross-Petitioner's Writ of Certiorari upon the other parties to this action on May 11, 1984 by mailing one true copy of same by first class mail, postage prepaid to:

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Dated: March 11, 1984


Steven A. Mitov

RESPONDENT'S BRIEF

①
Nos. 83-6381 and 83-1660

Office - Supreme Court, U.S.

FILED

MAY 29 1984

ALEXANDER L. STEVENS

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

—
GILL PARKER, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

—
CHARLES M. ATKINS, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
PETITIONER

v.

GILL PARKER, ET AL.

—
ON CROSS-PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

—
BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether notices sent by Massachusetts' Department of Public Welfare to food stamp recipients advising them of a statutory change affecting Food Stamp benefit levels were inadequate under the Food Stamp Act or the federal regulations promulgated pursuant thereto.

2. Whether the due process clause requires that individualized advance notice be given to each affected food stamp recipient prior to the implementation of statutory benefit level adjustments when the statutory change can be implemented without any new or additional factual findings as to individual recipients.

3. Assuming that the due process clause requires some type of individualized advance notice, whether the notices issued in the instant case, which generally informed recipients of the change in federal law without specifying how the benefits of the individual recipient would be affected, denied due process.

4. If the notices in this case were legally insufficient for any reason, but at least 95% of the benefit adjustments were nevertheless accurate, whether the court of appeals abused its discretion in setting aside the district court's order (1) requiring that all Massachusetts food stamp recipients affected by the statutory change be refunded the amount of the benefit reduction and (2) requiring the state to submit for court approval regulations governing notice of any future reduction in food stamp benefits.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-6381

GILL PARKER, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

No. 83-1660

CHARLES M. ATKINS, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
PETITIONER

v.

GILL PARKER, ET AL.

ON CROSS-PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A38)¹ is reported at 722 F.2d 933. The opinion of

¹ "Pet App." denotes the Appendix to 83-1660.

the district court (Pet. App. A42-A98) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1983. The petition in No. 83-6381 was filed on March 6, 1984. The conditional cross-petition, No. 83-1660, was filed on April 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Food Stamp Program is a joint federal/state effort to "permit low-income households to obtain a more nutritious diet through normal channels of trade" (7 U.S.C. 2011). Households certified as eligible are issued coupons ("food stamps") which they may use to purchase food at approved stores. 7 U.S.C. 2012 and 2013. The federal government bears the entire cost of food stamps redeemed through the Treasury. 7 U.S.C. 2013(a). While the Secretary of Agriculture prescribes uniform standards for food stamp eligibility (see 7 U.S.C. 2014), eligibility determinations are made by agencies of the states pursuant to approved plans implementing the federal standards. State agencies also perform the actual distribution of coupons. 7 U.S.C. 2020(a). The Secretary of Agriculture is authorized to reimburse the state agencies for up to 50% of the administrative costs associated with processing applications, storing and distributing coupons, and making administrative determinations. 7 U.S.C. 2025(a).

A household certified as eligible for food stamp benefits ordinarily will receive the same level of benefits for each month of its "certification period"—the period of time for which the approval of the

household's Food Stamp application is effective.² Certain events, however, may trigger a reduction in the level of benefits prior to the end of a household's certification period. The notice requirements for implementing such a benefit reduction depend upon the nature of the event that triggers the reduction. Most commonly, a change in the *facts* underlying the individual household's certification—for example, an increase in household income, the departure of a dependent from the household or a conviction for program fraud—will lead the state to commence a household-specific "adverse action" proceeding. In such cases federal regulations require that, 10 days prior to the effective date of the adverse action, the household receive a notice stating (7 C.F.R. 273.13 (a) (2)):

The proposed action; the reason for the proposed action; the household's right to request a fair hearing; the telephone number and, if possible, the name of the person to contact for additional information; the availability of continued benefits; and the liability of the household for any overissuances received while awaiting a fair hearing if the hearing official's decision is adverse to the household. If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service.

The other kind of event that may reduce a household's allotment of Food Stamps during its certification period is a change in the *law* to be applied to

² Certification periods vary from one month to one year, depending upon an administrative evaluation of the financial stability of the household. See 7 U.S.C. 2012(c); 7 C.F.R. 273.10(f) (3)-(6).

the data concerning recipient households already on file. Such "mass changes" affect all certified households or defined classes thereof.³ Federal regulations governing mass changes provide that states implementing a mass change must send notices to each affected household advising of the change in general terms. 7 C.F.R. 273.12(e)(2)(ii). The regulations further require that any food stamp recipient that believes that the Food Stamp allotment it has received was erroneously calculated be afforded a hearing upon request. If a hearing is requested the former level of benefits is to be restored until the recipient's complaint is acted upon unless the complaint is based upon opposition to the underlying legal change. *Ibid.* The advance notice and content requirements applicable to "adverse actions" do not apply to mass changes. 7 C.F.R. 273.13(b)(1).

Eligibility for, and the level of, Food Stamp benefits is largely based upon household income. To maintain an incentive to earn and report income, the Secretary of Agriculture adopted a policy of deducting or "disregarding" 20% of a household's earned income in making eligibility and benefit level determinations. Congress codified this policy in the Food Stamp Act of 1977. See 7 U.S.C. (Supp. II) 2014(e). As part of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 357, however, Congress made a number of changes in the operation of the food stamp program. By Section 106

³ Mass changes include statutory adjustments to the eligibility criteria, deductions, adjustments in the benefits provided by other state and federal welfare programs, Social Security benefit changes, and "other changes in the eligibility criteria based on legislative or regulatory actions." 7 C.F.R. 273.12(e).

of OBRA (95 Stat. 360) the Food Stamp Act was amended to reduce the earned income "disregard" from 20% to 18%. See 7 U.S.C. 2014(e). As a result of this change, some previously eligible families experienced a small reduction in their monthly food stamp allotment while some became ineligible for food stamps. Still other households were entirely unaffected by the change.⁴ To implement the provisions of OBRA affecting the Food Stamp Program, the Department of Agriculture issued regulations, 46 Fed. Reg. 44712 *et seq.* (1981), which directed the states to implement Section 106, while affording notice to recipients in the manner prescribed for mass changes. 7 C.F.R. 272.1(g)(ii) at 46 Fed. Reg. 44722 (1981).

2. Toward the end of November, 1981, the Massachusetts Department of Public Welfare issued the required notices to the food stamp households believed to be affected by the statutory reduction in the earned income deduction (Pet. App. A3). These notices gave recipients the right to appeal (and thus to prevent the reduction from going into effect while the appeal was pending) within 10 days. The notices, however, were ambiguously dated "11/18" (*id.* at

⁴ The reduction in the earned income disregard did not necessarily reduce the benefits of a household, especially if the household had relatively small amounts of earned income or a low Food Stamp allotment. As the amount of earned income increased, the reduction in the amount disregarded would generally increase as well, gradually reducing the Food Stamp allotment. We are advised that the reductions involved would not exceed \$4 per month. In some instances a household with relatively high income that had qualified only for the minimum allotment of Food Stamps (\$10 per month) prior to the enactment of OBRA was rendered ineligible as a result of the decrease in the earned income disregard.

A4). On December 10, 1981, four food stamp recipients brought this action in the United States District Court for the District of Massachusetts challenging the validity of these notices on behalf of a purported class of approximately 16,500 households that had received the notices.

After a temporary restraining order barring implementation of the earned income disregard adjustment was issued, the State took steps to moot any question arising from the ambiguity of the appeal deadline by issuing a second notice, dated December 26, 1981 and mailed on or about December 24. The first page of the December notice stated that the earlier notice had been withdrawn. The second page of the notice began " * * * **IMPORTANT NOTICE—READ CAREFULLY** * * *" and stated:

RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL: 106 CMR:364.400).

The notice then explained that the household had a "RIGHT TO A FAIR HEARING" and explained

how an appeal could be taken.⁵ After receiving this notice, plaintiffs amended their complaint to attack its sufficiency. A renewed application for a temporary restraining order was denied, and the reductions required by OBRA Section 106 were effectuated for Massachusetts food stamp recipients beginning in January 1982.

After a two-day trial, the district court ruled in petitioners' favor and entered findings of fact and conclusions of law (Pet. App. A42-A98). The district court found that the language employed in the notices rendered them incomprehensible to "many" members of plaintiffs' class (Pet. App. A56-A67).⁶ The district court further found that the notices could have been written at a simpler level, and could have been framed to state the former benefit level for the particular household, the new benefit level, "a precise statement of the reason for the nature of the

⁵ A photocopy of the notice as set forth in the court of appeals' slip opinion is attached to the petition (83-6381 Pet. App. A4).

We note that Massachusetts went beyond the mandate of federal regulations by allowing for restoration of the reduced benefits if an appeal was taken within the 10-day deadline even if the appeal merely voiced disagreement with the statutory change. Compare page 4, *supra*.

⁶ The district court's finding is based upon the testimony of reading experts presented by petitioners. According to the district court the words and phrases which rendered the December notices difficult for some recipients to comprehend included: "within," "division," "recent," "federal benefits," "eligibility," "eligible," "appeal," "reduced," "reduction," "deduction," "request," "action," "local," "welfare," "percent," "disagree," "terminated," "computation," "contract," "enclosed," "current benefits," "certification," "federal percent," "welfare," "You have a right to a fair hearing," "reinstated," "the earned income deduction has been lowered from 20 percent to 18 percent," "terminated," and "appeal is denied."

change, and sufficient information to allow its recipient to determine whether the proposed action is correct" (*id.* at A76). The district court found that errors in the computation of Food Stamp allotment in Massachusetts occurred in between 2% and 4.2% of all recipient households (Pet. App. A77-A84).⁷

Invoking the procedural due process analysis outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the district court held the notices issued by the state to be insufficient. The court reasoned that plaintiffs presented "extremely significant" private interests in securing Food Stamp benefits; that there was a substantial risk of erroneous deprivation of benefits which use of more complete notices could have reduced; and that these improvements could be implemented without "any real hardship" (Pet. App. A86-A95). The district court also held that because of its format and difficult language the notice did not reasonably convey the information it contained (*id.* at A96-A98). In addition, the district court held,

⁷ Massachusetts reported a 13% error rate, 11% of which represented *overpayments* (Pet. App. A77). Petitioners introduced the testimony of a law student, employed by their attorneys as a clerk, who reviewed a computer printout of the 16,000 persons receiving the December notice, took a random sample of 5,013, and found that 211 households with no earned income had a change in benefits (*id.* at A80-A81). Although there was no direct testimony to this effect, the district court inferred that each of these households received erroneously computed benefits (Pet. App. A82-A83). However, this error rate of 4.2% (211/5013), might be explained by the introduction by the State, contemporaneous with the change in earned income disregard, of a new monthly income reporting system that was badly backlogged (*id.* at A78-A80). In any event, the 4.2% error rate may be exaggerated because the law student included *increases* as well as *decreases* in his account of errors (II JA 71-79).

without elaboration, that the State's notices violated the advance notice requirements and the content requirements applicable to "adverse actions" established by the Food Stamp Act and federal regulations (*id.* at A98).

The district court directed the defendants to restore to every member of the class that had received the State's notice the amount by which its food stamp benefits had been reduced in order to implement the change in the earned income disregard required by OBRA (Pet. App. A101). In addition, the Massachusetts Commissioner of Public Welfare was permanently enjoined from reducing or terminating the benefits of any food stamp recipient without providing 10 days' advance notice containing at least the following information (*id.* at A103-A104):

- a. An explanation of the reason for the proposed action;
- b. The specific citation that supports the proposed action;
- c. The benefit amount prior to the proposed change;
- d. The benefit amount after the proposed change;
- e. Sufficient information to allow the recipient to determine whether an error has been made; and
- f. The effective date of the proposed action.

The State defendant was also directed to submit for the court's review and approval new regulations "containing specific standards to ensure that all future food stamp notices of reduction or termination are written and printed so as to be understandable to recipients of those notices" (*id.* at A102).

3. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A38). Initially, the

court of appeals sustained the district court's ruling that the State's notice of the implementation of the reduction in the earned income disregard was constitutionally deficient (*id.* at A11-A28). The court rejected the government's argument that because the change in the earned income disregard was statutorily mandated, food stamp recipients could not claim any procedural due process rights respecting notice of its implementation (*id.* at A11-A14). The court reasoned that unless a statutory entitlement program is entirely abolished, "people have the right to participate in accordance with" the "preestablished ground rules" and that the implementation of any statutory change in the program affecting the terms of participation is subject to procedural due process review under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (Pet. App. A13-A14, A17). Treating the question whether the *Mathews* analysis had been correctly applied by the district court as one subject to the clearly erroneous standard (*id.* at A19-A20, A25-A26), the court of appeals declined to set aside the lower courts' constitutional ruling (*id.* at A21-A25).

In addition, the court of appeals upheld the district court's ruling that the State's notices violated the Food Stamp Act, 7 U.S.C. 2020(e)(10), and the Department of Agriculture's mass change regulations, 7 C.F.R. 273.12(e)(2)(ii), on the grounds that sufficient advance notice of the earned income disregard reduction was not provided, and that the mass change notice was inadequately informative (Pet. App. A28-A32). On the other hand, the court of appeals held that the mass change notices were not required to comply with federal regulations governing the contents of notices of adverse actions (*id.* at A28-A29).

The court of appeals set aside the remedies ordered by the district court (Pet. App. A32-A38).

The court of appeals observed that the complete restoration of food stamp benefits at their former level to all recipients

was unwarranted, given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated. *Restoration of benefits would constitute a windfall to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress.*

Pet. App. A33 (emphasis added). In addition, because food stamp benefits are funded by the federal government, a remedy of "wholesale benefit restoration" would have the perverse effect of undermining the states' incentive to provide sufficient notice, the court of appeals observed (*id.* at A34).

Although rectification of the notice deficiencies would ordinarily be the most appropriate remedy, the court of appeals reasoned, providing such additional notice after the earned income disregard change had been implemented would, most likely, "merely confuse recipients" (Pet. App. A35). Accordingly, the court of appeals instead directed the State to undertake a "thorough and accurate" review of the files of all members of the class and to correct any errors discovered (*id.* at A35-A37). Finally, because there was no indication that the state had acted in bad faith or would issue deficient notices in the future, and had in fact issued valid notices in comparable situations in the past, the court of appeals concluded that "the district court placed an improper and unnecessary burden upon [the state agency] when it specified the form of future notices and required the submission and promulgation of new notice regulations" (*id.* at A38).

ARGUMENT

Petitioners' contention that the court of appeals was required to direct "restor[ation]" of food stamp benefits to all members of a class of plaintiffs, at least 95% of whom have already received the maximum benefit authorized by law, is plainly without merit, and the petition should be denied. On the other hand, the State's cross-petition raises serious questions. In our view, the constitutional analysis of the court of appeals is seriously flawed. Moreover, the court of appeals erred in holding that the notices of reduction in the earned income disregard issued by the State in December 1981 violated either the Food Stamp Act or Department of Agriculture's regulations. However, because the court of appeals provided the federal and state defendants with appropriate relief from the draconian remedies awarded by the district court, review of the court's statutory and constitutional holdings is not independently necessary. Accordingly, the Court should grant the conditional cross-petition only if, contrary to our submission, the petition in No. 83-6381 addressing the remedial issues is granted.

In order to present our assessment of this case in coherent fashion we address the underlying merits—the issues raised by the cross-petition—before turning to the remedial issue.

1. a. We cannot agree with the court of appeals' conclusion that the notice given by the State of the reduction in the food stamp program earned income disregard was constitutionally insufficient. We submit, as a threshold matter, that the due process clause ordinarily does not require any individual administrative notice prior to effectuation of statutory changes in welfare benefits or other "entitlements,"

and that the analytical framework of *Mathews v. Eldridge* simply has no application in such instances, provided that no new factual findings need be made to implement the change. Provided it does not act in a wholly arbitrary manner, the due process clause "cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Richardson v. Belcher*, 404 U.S. 78, 81 (1971).⁸ Because Congress itself adjusted the earned income disregard that is applicable to computation of petitioner's benefits, no authority exists for continuing to pay benefits according to the schedule that formerly prevailed, and the courts are not free to subvert the will of Congress by imposing notice requirements of a kind generally applicable to *administrative* action as a precondition to effectuation of the statutory scheme. Cf. *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981); *FCIC v. Merrill*, 332 U.S. 380, 385 (1947).

A14-A15), its analysis of the constitutional issue is without support in the decisions of this Court or any other court. The court reasoned (Pet. App. A12-A13), ~~court. The court reasoned (Pet. App. A12-A13),~~ however, that unless procedural due process requirements were extended to cases in which the individual's interest at issue extends beyond any statutory entitlement, the protection of the due process clause would be eliminated in the entire class of cases in which the government seeks to terminate or deny any claim to an entitlement benefit. The court reasoned

⁸ The court of appeals' suggestion (Pet. App. A14) that, so long as Congress does not abolish a statutory entitlement program, a participant has an interest, cognizable in a procedural due process analysis, in continuing to participate under "preestablished ground rules" accordingly is untenable.

⁹As the court of appeals acknowledged (Pet. App.

that in such cases the government's position, of necessity, is that there is no statutory right to the claimed benefits. The court of appeals' reasoning fails, however, because it confuses two very different kinds of cases. In one class of cases, such as *Goldberg v. Kelly*, 397 U.S. 254 (1970), notice and hearing rights are to be measured against a flexible due process standard because the agency's action is predicated upon a factual evaluation of the claimant or recipient's eligibility or entitlement under settled legal standards. These are essentially the class of cases governed for purposes of the Food Stamp Program by the "adverse action" regulations. See page 3, *supra*. The court of appeals correctly recognized that the due process guaranty would be subverted if the government's claim that an individual was, as a matter of fact, ineligible for statutory benefits, was sufficient to deny the individual any procedural safeguards to test the correctness of the government decision. To be distinguished from such "adverse actions," however, are "mass changes," such as the one at issue here, that are effected by legislative action and can be implemented on the basis of factual information already in the recipient's file by means of simple arithmetic computations. Because implementation of the change does not rest upon any new factual determination by the government agency—with attendant possibilities for error—due process does not require that advance notice be given of effectuation of such statutory changes in benefit entitlements. See *Codd v. Velger*, 429 U.S. 624, 627 (1977).

b. Assuming that the *Mathews v. Eldridge* analysis is applicable to this case at all, the courts below misapplied it here. *Mathews v. Eldridge* identifies three "distinct factors" to be balanced to determine if procedural safeguards for protected interests are suffi-

cient: the private interest at stake; the risk of erroneous deprivation and the probable value of additional safeguards; and the government's interest in avoiding fiscal or administrative burdens associated with additional safeguards. 424 U.S. at 335. For present purposes, the critical inquiry under *Mathews v. Eldridge* is whether the beneficiaries' statutory entitlement to correctly computed food stamp allotments was unduly jeopardized by the procedures employed by the State and whether use of different procedures would meaningfully reduce the chance of error. The lower courts' conclusion (Pet. App. A77-A84, A88-A91) that the risk of an erroneous deprivation of benefits was great and that use of more elaborate notices would reduce the error rate is unfounded. In fact, it is most likely that no errors whatsoever were made by the State that are attributable to the adjustment of the earned income disregard from 20% to 18%. The change was effected by an appropriate revision in a computer program applied across the board (Pet. App. A21-A23). Accordingly the error rate should logically be either zero or 100%.

No claim is made here that the computer instruction was defective, and the court of appeals acknowledged that the argument we make here is "appealing in theory" (*id.* at A23).⁴ The court of appeals nevertheless declined to label the district court's finding

⁴ In *Mathews v. Eldridge*, the Court recognized the distinction between terminating a person from a welfare program on the basis of information where issues of witness credibility are involved and discontinuing disability benefits pending appeal where the decision is based upon unbiased scientific medical reports. 424 U.S. 343-345. Here we are dealing with arithmetic "evidence" only; the possibility of error rate is negligible and the demands of due process are accordingly modest.

that there was a substantial risk of error "clearly erroneous," because of the possibility that the underlying data in the files of individual recipients was inaccurate—a possibility that was exacerbated by delays in entry of updated information into the data processing facility (Pet. App. A23-A24). But any error in benefit computations attributable to inaccuracy in the underlying data, or delays in updating that data is analytically distinct from error in the implementation of the earned income disregard. Indeed, if such underlying errors existed, they would have resulted in erroneous computation of petitioner's benefits, whether or not the mass change had been implemented. There is simply no indication in the record that there was a significant possibility of error in implementing the mass change.¹⁰ The courts below accordingly had no authority to impose more elaborate procedures and notices in the name of due process.¹¹

2. We also disagree with the court of appeals' conclusion that the Food Stamp Act and Department of

¹⁰ The error rate found by the district court, which was in any event quite low, did not distinguish between underlying errors and errors in the implementation of the earned income disregard adjustment. See page 8 & note 7, *supra*.

¹¹ The court of appeals appears to have essentially abdicated its responsibility to review the district court's decision by relying upon the clearly erroneous rule once it was satisfied that "the district court applied the appropriate legal standard, the *Mathews* balancing test" (Pet. App. A20). The court of appeals' view (*id.* at A19) that the clearly erroneous standard of review applies to mixed questions of fact and law is inconsistent with *Bose Corp. v. Consumers Union*, No. 82-1246 (Apr. 30, 1984), slip op. 15. Moreover, the use of a highly deferential standard of review is especially troubling given the amorphous nature of the *Mathews* balancing test.

Agriculture regulations were violated by the States' failure to provide advance notice of the implementation of the earned income disregard adjustment. Nothing in the language of the statute or regulation cited by the court of appeals imposes any advance notice requirement as to mass changes. Indeed, because 7 U.S.C. 2020(e)(10) refers explicitly to "adverse actions" it is unlikely that Congress ever contemplated its application to mass changes. Congress understood that the Secretary's "regulations do not require individual notice of adverse action when mass changes in [the] program" are implemented. H.R. Rep. 95-464, 95th Cong., 1st Sess. 289 (1977).

The court of appeals also held that the mass change notice issued by the State was insufficiently informative to comply with the statutory and regulatory notice requirements applicable to mass changes. But this ruling rested entirely upon the court's view that the notices were constitutionally insufficient (Pet. App. A31-A32). No independent basis exists for this ruling.

3. For the foregoing reasons, we believe that the court of appeals erred in finding the Massachusetts notice unlawful. Accordingly, petitioners were not entitled to any remedy. But assuming that the court of appeals' rulings on the merits were correct and that there was a wrong that required remedial action above and beyond declaratory relief, the file review ordered by the court of appeals was, for the reasons stated by that court (see pages 10-11, *supra*), the most extensive remedy that could be justified. Petitioners' argument that they should have been permitted to retain the windfall bestowed upon them by the district court is not supported by any legal argument that merits further consideration.

a. Contrary to the petitioner's contention (Pet. 6-12), the decision of the court of appeals does not conflict with anything in *Pennhurst State School & Hospital v. Halderman*, No. 81-2101 (Jan. 23, 1984). The Court's passing statement (slip op. 18 n.17) that the good faith of an official defendant does not render him *immune* from injunctive relief as it does from damages, does not purport to discard settled teaching as to whether imposition of an injunction is appropriate in particular circumstances, or to deprive lower courts of discretion to deny an injunction. In any event, the good faith of the State defendants was cited by the court of appeals simply as one of several factors that made it clear that injunctive relief against the State was unwarranted because the state could be expected to honor its legal obligations without an injunction.

b. Equally unfounded is petitioner's claim (Pet. 13-18) that restoration of all food stamp benefits to the level prescribed prior to the enactment of OBRA is required by provisions of the Food Stamp Act, 7 U.S.C. 2023(b), upon which petitioners rely, directs federal courts to restore "any food stamp allotments found to have been wrongfully withheld." But no food stamp allotments were found to have been improperly withheld in this case. Even the district court found only a notice defect and the court of appeals acknowledged the absence of evidence in the record that "recipients had their benefits improperly reduced or terminated" (Pet. App. A33).¹²

¹² Contrary to petitioner's suggestion (Pet. 15-18), awarding monetary benefits that Congress has denied cannot be justified as a remedy for defective notice. See *Schweiker v. Hansen*, 450 U.S. at 788-790.

CONCLUSION

The petition for a writ of certiorari in No. 83-6381 should be denied. If, however, the petition for a writ of certiorari is granted, the State's contingent cross-petition should also be granted.

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BRUCE G. FORREST

Attorneys

MAY 1984

JOINT APPENDIX

AUG 2 1984

Nos. 83-6381 and 83-1660

ALAN PARKER L. STEVENS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GILL PARKER, et al.,

PETITIONERS,

v.

JOHN R. BLOCK, Secretary of Agriculture, et al.,

RESPONDENTS.

CHARLES M. ATKINS, Commissioner of
the Massachusetts Department of Public Welfare,

PETITIONER,

v.

GILL PARKER, et al.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 6, 1984
CROSS-PETITION FOR CERTIORARI FILED APRIL 9, 1984
CERTIORARI GRANTED JUNE 18, 1984

BEST AVAILABLE COPY

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RELEVANT DOCKET ENTRIES

DISTRICT COURT No. 81-0365-F

<i>Date</i>	<i>NR</i>	<i>Proceedings</i>
<i>1981</i>		
Dec. 10	02	Complaint filed; summons issued.
Dec. 16	07	FREEDMAN, J. Hearing on Pltfs' motion for a temporary restraining order.
Dec. 17	08	FREEDMAN, J. Order entered on Class Certification and TRO.
Dec. 31	17	FREEDMAN, J. Hearing on Ps' Motion for Contempt or TRO: argument; motion denied.
<i>1982</i>		
Jan. 06	18	AMENDED SUPPLEMENTAL COMPLAINT filed
Jan. 26	25	DEF. SPIRITO'S ANSWER filed
Feb. 10	31	Def. Block's ANSWER to AMENDED SUPPLEMENTAL COMPLAINT filed; cs
Feb. 11	31	FREEDMAN, J. Counsel present for hearing on the merits. Court continues hearing until such time that counsel have agreed on the issues to be heard and discovery matters have been resolved. Discovery problems to be referred to Magistrate in Boston.
May 10	41	Def. Spirito's Motion to Amend Answer filed.
May 18	44	FREEDMAN, J. #41 ALLOWED (by EMK).
Oct. 12	74	FREEDMAN, J. Counsel and parties present for non-jury trial.
<i>1983</i>		
Mar. 24	89	FREEDMAN, J. Findings of Fact & Conclusions of Law Entered.
Mar. 24	90	FREEDMAN, J. Order entered.
Mar. 25	91	Judgment for Plaintiffs entered.

DISTRICT COURT No. 81-0365-F

Date	NR	Proceedings
1983		
Apr. 5	92	State Deft's motion to alter or amend judgment filed.
Apr. 6	93	State Deft's notice of appeal filed.
Apr. 6	94	FREEDMAN, J. Corrected Order Entered.
Apr. 7	95	FREEDMAN, J. Corrected Order Entered.

COURT OF APPEALS No. 83-1270

Filings-Proceedings

Jun. 20	Brief and appendix for the Mass. Commissioner of Public Welfare received and filed.
Jul. 21	Brief of appellees received and filed.
Jul. 29	Reply brief of the Massachusetts Commissioner of Public Welfare, Defendant Appellant, received and filed.
Aug. 1	Reply brief for the Federal Appellant received and filed.
Sept. 7	Heard by Coffin, Bownes and Fairchild, JJ.
Dec. 7	JUDGMENT: The judgment of the district court is affirmed in part, reversed in part and the cause is remanded to the district court for further proceedings consistent with the opinion this date. No costs. Opinion of the Court by Coffin, J.

1984

Mar. 06	Order (Coffin, Fairchild and Bownes, JJ) denying belated motion of enlarge time of the appellees to file a petition for rehearing in accordance with the order of this Court.
Mar. 15	Mandate issued, copy filed and original papers returned to the District Court.

No. 83-1320

May 16	Motion filed. Order (Coffin, J) consolidating this case and 83-1270 for purpose of argument.
Jun. 20	Brief for Federal appellant received and filed.
Dec. 7	Judgment.

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE

11/81

• 18% •

*** IMPORTANT NOTICE - READ CAREFULLY ***

RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. UNDER THIS LAW, THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL CITATION: 106 CMR:364.400)

YOUR RIGHT TO A FAIR HEARING:

YOU HAVE THE RIGHT TO REQUEST A FAIR HEARING IF YOU DISAGREE WITH THIS ACTION. IF YOU ARE REQUESTING A HEARING, YOUR FOOD STAMP BENEFITS WILL BE REINSTATED AT THE CURRENT AMOUNT IF YOUR APPEAL IS RECEIVED BY THE DIVISION OF HEARINGS WITHIN 10 DAYS OF THIS NOTICE. IF YOUR APPEAL IS DENIED, THE DEPARTMENT HAS THE RIGHT TO RECOVER FROM YOU ANY ADDED BENEFITS WHICH YOU RECEIVED DURING THE APPEAL PROCESS. YOU MAY STILL APPEAL THIS ACTION AFTER TEN DAYS, BUT YOU MUST DO SO WITHIN 90 DAYS OF THE DATE OF THIS NOTICE. OTHERWISE, YOUR REQUEST FOR HEARING AFTER THAT DATE WILL BE DENIED. TO REQUEST A FAIR HEARING, YOU MUST SIGN AND DATE THE ENCLOSED CARD ON WHICH YOUR NAME AND ADDRESS ARE PRE-PRINTED AND MAIL IT TO: DIVISION OF HEARINGS, P.O. BOX 167, ESSEX STATION, BOSTON, MA 02112. IF YOU HAVE QUESTIONS CONCERNING THE CORRECTNESS OF YOUR BENEFITS COMPUTATION OR THE FAIR HEARING PROCESS, CONTACT YOUR LOCAL WELFARE OFFICE. YOU MAY FILE AN APPEAL AT ANY TIME IF YOU FEEL THAT YOU ARE NOT RECEIVING THE CORRECT AMOUNT OF FOOD STAMPS.

IMPORTANT FOOD STAMP NOTICE, READ CAREFULLY

If you received a Food Stamp ATP this month, it reflected a reduction in benefit level. You received information concerning this reduction in a prior notice. Because there was not a specific date on the prior notice, you may not have been certain as to the date by which you had a right to appeal the reduction. As a result of the omission of the date, your appeal rights have been extended and your benefits for the month of December have been reinstated to their prior level. Please see page 2 of this notice for your appeal rights and for information regarding the reasons for the changes. The reductions will be effective 1/1/82 and will be reflected in your January ATP.

If you did not receive a December ATP, your benefits will be terminated effective with your January 1982 ATP. For your appeal rights see page 2. However you will receive a Food Stamp ATP for December at the prior benefit level.

If you have already appealed on the basis of the prior notice, that appeal will be heard and your Food Stamp benefits will be continued at the reinstated level until the appeal is decided, and you need not file a second appeal at this time. If you have not appealed and now wish to do so, your appeal rights contained on page 2 begin to run from the date at the top of this page.

The change in your benefits will be based upon your earned income as last reported to the Department. If you have a change of income of less than \$25, you should report the change to the Department as it may be of benefit to you.

If you have received an ATP, the amount reflects a reduction resulting from the changes described on page 2. This amount is the benefit level that will be effective in January 1982; however, you will receive a supplement to bring the December benefit level amount up to the prior level.

If you have been notified that your certification period ends on 12/31/81, you must have taken action to be recertified. In this situation you may appeal the Department's action but you will not be entitled to receive continuation of your benefits pending appeal.

This notice refers only to changes described on page 2. Any other changes will remain in effect. This is not an additional reduction in your Food Stamp benefit amount.

December 26, 1981

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE

PAGE 2
18%*** IMPORTANT NOTICE - READ CAREFULLY ***

RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. UNDER THIS LAW, THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL CITATION: 106 CMR:364.400)

YOUR RIGHT TO A FAIR HEARING:

YOU HAVE THE RIGHT TO REQUEST A FAIR HEARING IF YOU DISAGREE WITH THIS ACTION. IF YOU ARE REQUESTING A HEARING, YOUR FOOD STAMP BENEFITS WILL BE REINSTATED AT THE CURRENT AMOUNT IF YOUR APPEAL IS RECEIVED BY THE DIVISION OF HEARINGS WITHIN 10 DAYS OF THE DATE AT THE TOP OF THIS PAGE. IF YOUR APPEAL IS DENIED, THE DEPARTMENT HAS THE RIGHT TO RECOVER FROM YOU ANY ADDED BENEFITS WHICH YOU RECEIVED DURING THE APPEAL PROCESS. YOU MAY STILL APPEAL THIS ACTION AFTER TEN DAYS, BUT YOU MUST DO SO WITHIN 90 DAYS OF THE DATE AT THE TOP OF THIS PAGE. OTHERWISE, YOUR REQUEST FOR A FAIR HEARING AFTER THAT DATE WILL BE DENIED. TO REQUEST A FAIR HEARING, YOU MUST SIGN AND DATE THE ENCLOSED CARD ON WHICH YOUR NAME AND ADDRESS ARE PRE-PRINTED AND MAIL IT TO: DIVISION OF HEARINGS, P.O. BOX 167, ESSEX STATION, BOSTON, MA 02112. IF YOU HAVE QUESTIONS CONCERNING THE CORRECTNESS OF YOUR BENEFITS COMPUTATION OR THE FAIR HEARING PROCESS, CONTACT YOUR LOCAL WELFARE OFFICE. YOU MAY FILE AN APPEAL AT ANY TIME IF YOU FEEL THAT YOU ARE NOT RECEIVING THE CORRECT AMOUNT OF FOOD STAMPS.

CR

[TITLE OMITTED IN PRINTING]

DEFENDANT SPIRITO'S RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSIONS

1. Every household which was participating in the Monthly Income Reporting System in November 1981 and which also received food stamps at that time was sent the undated notice.

RESPONSE: Admitted.

2. Every household which was participating in the Monthly Income Reporting System in November 1981 and which also received food stamps at that time was sent the December 26 notice.

RESPONSE: Admitted.

3. In November 1981, for those food stamp households participating in the Monthly Income Reporting System, the individual data which the BSO computer needed in order to compute and issue that household's December, 1981 ATP was obtained directly from the MIRS computer.

RESPONSE: The state defendant is unable at the present time to admit or deny this request. Upon further investigation and discussions with appropriate officials, the state defendant will supplement its response.

4. Every household which is listed on the 902 Report was sent the December notice.

RESPONSE: Admitted.

5. Every household which is listed on the 902 Report was sent the December 26 notice.

RESPONSE: Admitted.

6. The 902 Report is organized so that households are listed by their local welfare service office and, within the local welfare service office listing, households are listed by the caseworker responsible for those households.

RESPONSE: Admitted.

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DEFENDANT SPIRITO'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

1. QUESTION: State the number of food stamp households which were sent the general notice (annexed to the complaint herein as Exhibit 'A') implementing the 18% earned income deduction in the food stamp program.

ANSWER: 19,654 households.

2. QUESTION: For each household included in your answer to Interrogatory #1, state the amount of food stamp benefits that that household received in November, 1981 and the amount of food stamp benefits that that household was scheduled to receive in December, 1981 based upon application of the 18% earned income disregard to that household.

ANSWER: A. G.L. c. 66, §17A precludes the release of information relating to individual food stamp households.

13. QUESTION: Are the machines presently utilized by the Department capable of generating individual food stamp notices to the entire plaintiff class, including the exact dollar amount of any reduction in food stamps due to the change from 20% to 18% in the earned income disregard, if programmed differently or if the present programs were modified? If the answer to this Interrogatory is yes, why haven't the machines been so programmed?

ANSWER: Yes; with respect to mass changes, federal regulations do not require individual food

stamp notices which include the exact dollar amount of any reductions in food stamps.

16. QUESTION: By what method was page one (1) of the notice of December 26, 1981 reproduced?

ANSWER: The notice was typed on standard 8½ x 11 inch paper. The document was reduced and a paper master was created. The cards were produced using offset printing equipment.

17. QUESTION: Were any employees of the United States Department of Agriculture involved in drafting, reviewing or approving either the original "notice" or the December 26 notice? If so identify each such individual by name and position, and describe each such individual's responsibilities with respect to the notice with which they were involved.

ANSWER: No.

19. QUESTION: How many members of the class received notices (other than the 18% notices)

a) in October, 1981 increasing their food stamps?

b) in November, 1981 increasing their food stamps?

c) in December, 1981 increasing their food stamps?

d) in October, 1981 decreasing their food stamps?

e) in November, 1981 decreasing their food stamps?

f) in December, 1981 decreasing their food stamps?

ANSWER: There are no records from which this information can be readily obtained.

20. QUESTION: How many members of the class actually had their food stamp benefits changed for reasons other than the 18% change

a) in October, 1981?

b) in November, 1981?

c) in December, 1981?

d) in January, 1982?

ANSWER: See answer to Interrogatory No. 19.

25. QUESTION: When was the data collected upon which the 18% earned income disregard terminations and reductions of food stamps were made?

ANSWER: The data was collected at various times from the last period of recertification for each household.

26. QUESTION: What was the cut-off date for getting new data concerning changes in a food stamp household's income, expenses, deductions or exclusions into the computer in order to be reflected in the December, 1981 ATP?

ANSWER: On or about November 25, 1981.

27. QUESTION: Was there any backlog or delay in processing new data concerning a food stamp household's income, expenses, deductions or exclusions and entering this data into the computer? If so, explain the nature and extent of the backlog, the reason for the backlog and what steps were taken, if any, to protect recipients from being erroneously reduced or terminated due to the Department's inability to promptly process data changes and transmit such changes to the computer.

ANSWER: There was no backlog in the Regional Data Control Unit (RDCU) and local office

entry system. There was some backlog in the MIRS state-wide earnings case system which system is not relevant to the class in this lawsuit.

30. QUESTION: State the number of class members who have contacted the Department through the local offices or otherwise for additional information or clarification regarding either of the notices at issue herein or the reductions or terminations based upon those notices. For each such contact, state the name of the recipient or his/her advocate making the contact, the name and position of the Department employee contacted in each case, the date of the contact, and how the contact was recorded.

ANSWER: There are no records from which this information can be presently obtained.

36. QUESTION: State the name, address and telephone number (if known) of each and every member of the plaintiff class in this action.

ANSWER: G.L. c. 66, §17A precludes the release of reports which contain information relating to individual food stamp households.

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DEFENDANT SPIRITO'S ANSWERS TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

4. QUESTION: Please provide the following information: (a) the total number of food stamp households in Massachusetts in December 1981; (b) the number of Massachusetts food stamp households with earned income in December 1981; (c) the number of households participating in the Monthly Income Reporting System (MIRS) in December 1981 which received food stamps; (f) the number of households participating in MIRS in December 1981 which were sent in late November or early December 1981 the undated notice of reduction or termination of food stamps based upon the change in the earned income disregard from 20% to 18%.

ANSWER: a) Approximately 190,581
b) Approximately 19,654
c) The answer to this interrogatory is unavailable; however in no event is the figure greater than 25,000 (the number of households participating in MIRS).
d) No households participating in MIRS in December, 1981 were scheduled to receive the described notice; the Department is unable to determine if some MIRS' households received the notice through inadvertence or mistake.

5. QUESTION: Please state the number of food stamp households who received the December 26, 1981 notice and were recertified for food stamps:

- (a) in December 1981;
- (b) in January 1982;
- (c) in February 1982;
- (d) in March 1982.

ANSWER: (a) Approximately 700
 (b) Approximately 3200
 (c) Approximately 4638
 (d) Approximately 2474

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**DEFENDANT SPIRITO'S SUPPLEMENTAL ANSWERS
 TO PLAINTIFFS' SECOND SET OF INTERROGATORIES**

QUESTION: Please provide the following information:
 (c) the number of households participating in the Monthly Income Reporting System (MIRS) in December 1981 which received food stamps; (f) the number of households participating in MIRS in December 1981 which were sent in late November or early December 1981 the updated notice of reduction or termination of food stamps based upon the change in the earned income disregard from 20% to 18%.

ANSWER: (c) 9,191
 (f) 9,191
 Insofar as this supplemental answer differs from the previous answer given, the supplemental answer controls.

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AFFIDAVIT OF JAMES W. GLEICH

I, James W. Gleich, being duly sworn, depose and say:

1. Since September 1979, I have been the Director of the Monthly Income Reporting System (MIRS) for the Department of Public Welfare (DPW).

2. My principal duties and responsibilities include overseeing the general design, development, and implementation of the MIRS project. I supervise approximately 120 people. I report directly to Associate Commissioner James Hall.

3. The MIRS project became operational in November 1980 as a federally-funded pilot program. At that time, about 1,000 AFDC cases were converted to the MIRS project. All of these cases were serviced by either the Adams Street or the Roxbury Crossing Welfare Service Office (WSO).

4. The MIRS Project is designed to work as follows:

a. A monthly report is issued to AFDC recipients with both earned and unearned reportable income.

b. AFDC recipients return these reports to the Department of Public Welfare, providing information relative to their income and other eligibility factors.

c. This information is key entered into computer terminals, and the system calculates recipients' AFDC grant amounts and Food Stamp allotments, if any.

d. The MIRS computer generates notices to recipients informing them of any change in either their AFDC or Food Stamp benefits.

e. Updated AFDC and Food Stamp benefit amounts are transferred via magnetic tape to the state computer system operated by the Bureau of Systems Operations (BSO). The state computer then issues AFDC checks and Authorizations to Participate (ATPs) in the Food Stamp Program.

5. In September 1981, the MIRS project was greatly modified to implement federally-mandated policy changes affecting the AFDC and Food Stamp programs. Effective October 1, 1981, all AFDC cases throughout Massachusetts with earned income (approximately 23,000 households) were converted to the MIRS project. This conversion process more than doubled both the number of cases and the transaction load handled by the MIRS computer system.

6. On October 1, 1981, there was no data entry backlog in the MIRS project. All data worksheets returned from local Welfare Services Offices (WSOs) had been key punched by this date.

7. During the months of October and November 1981, a data entry backlog developed within the MIRS project. Approximately one-third of all data entry scheduled for October was processed during that month. Thus, during the month of November, it was necessary to process two-thirds of October's data plus all data scheduled for November.

8. To the best of my knowledge, this data entry backlog was primarily caused by the following factors:

a. There were serious staffing shortages within the MIRS project during October and November 1981. As more staff was added to the MIRS project, this data entry backlog steadily decreased.

b. The federally-mandated changes effective October 1, 1981 required all AFDC recipients to have their eligibility redetermined and their grant amounts recalculated. This process was time-consuming because all worker-submitted documents had to be reviewed prior to data entry. Similarly all computer-generated notices sent to recipients informing them of any change in AFDC or Food Stamp benefits had to be examined for accuracy of certification dates, calculations, and grant amounts.

c. These federal changes of October 1, 1981 had a delayed impact upon thousands of AFDC households. For

example, changes in Food Stamp allotments often did not take place until the following month, and the new data could not be immediately key entered into the MIRS computer.

d. The MIRS project initially experienced difficulties with opening new cases. In October and November 1981, this process took four days. Systems modifications made in December 1981 reduced this opening period to one day.

9. By the last week of December 1981, there was no data entry backlog in the MIRS project.

10. Currently, there are approximately 32,000 AFDC cases maintained in the Monthly Reporting System.

11. In order to prevent further data entry backlogs in the MIRS project and to ensure that recipients get their AFDC checks and Food Stamps in a timely manner, the following steps have been taken:

a. When a case is reported as experiencing problems, the MIRS unit reruns its files against the master file used by BSO to issue checks and ATPs. The MIRS computer system updates the BSO master file on a daily basis.

b. Each WSO has at least two people who can verify the correctness of MIRS-processed forms. If a mistake in an AFDC grant amount or a Food Stamp allotment is uncovered, corrective action can be instituted by telephone the same day. In most instances, corrections can be completed within one day.

c. The MIRS Project has adopted a team approach to data processing. Teams of up to six people, organized by WSO grouping, screen all documents prior to key entry. After key entry, the teams study all transactions and notices generated by the computer system. If a problem is encountered, the teams research its source and initiate corrective action. These teams also study two daily error reports: one which is generated by the MIRS computer and one which interfaces with the master file housed in the BSO computer.

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REPORT OF JEANNE S. CHALL AND SUE S. CONARD

This paper reports an analysis of the readability level of Food Stamp Notices (Page One — Gold Card and Page Two — Orange Card), issued by the Massachusetts Department of Public Welfare. This analysis was requested by Steven A. Hitov, Western Massachusetts Legal Services Incorporated, Springfield Massachusetts to determine the difficulty of the notices and whether they can be read and understood by Food Stamp recipients, a population whose reading ability is estimated to be at a maximum level of approximately eighth grade.

To predict difficulty in written text, readability formulas are most frequently used. These statistical techniques provide an objective measure of linguistic complexity through counts of elements found in the text. Most current readability formulas use two factors: a measure of vocabulary that relates to semantic aspects of difficulty and a measure of sentence complexity that relates to syntactic aspects of difficulty. Readability formulas do not purport to measure all aspects of difficulty, particularly the more qualitative ones.

Generally, readability formulas predict difficulty in terms of reading grade levels. Grade level, in this case, refers to a reading grade equivalent in terms of standardized reading test scores, not to a school grade placement. For example, a grade level of 7.0 for most formulas means that individuals who read on a seventh grade level as determined by a standardized reading test can be expected to read and understand the material with about 75 per cent accuracy on a multiple choice test or 40 per cent accuracy on a cloze test.

Method of Analysis

The readability (difficulty) levels of the two pages were assessed using two readability measures — the Dale-Chall Formula and the Fry Graph. Both these measures are suitable

for materials that cover a wide range of difficulty. The range of the Dale Chall Formula is from 4th grade to 16 + , college graduate level, and the Fry Graph approximate grade level range is from 1st to 17 + , also college graduate level.

A Dale-Chall formula raw score is obtained by calculating the average sentence length in samples of approximately 100 words, ending with complete sentences and the percentage of words not found on the Dale List of 3,000 Words,* a list of words known to fourth grade school students. With few exceptions, such as abbreviations and titles, unfamiliar words are counted each time they appear in a sample. Proper names and numerals are counted familiar. Raw scores are then converted to corrected grade levels expressed in terms of grade bands such as 5-6, 7-8, or 9-10.

Fry Graph* scores are obtained by counting the number of sentences in exact 100 word samples, estimating remaining sentences to the nearest tenth, and counting the number of syllables in each word of the sample. Included in the syllable count are proper names and numerals. Using the averages of these two counts for the samples taken, approximate grade levels can be read directly from the graph.

Following the readability analyses, more qualitative evaluations of the vocabulary, the sentences, and the text appearing on the food stamp notices are reported.

Readability Analysis of Page One — Gold Card (Table I)

Dale-Chall Formula Analysis: Three samples of approximately 100 words were selected at the beginning, near the middle, and near the end of the 404 word text of Page One. Data in Table I show that the average sentence length for the samples range from 20.6 to 23.2. The average sentence length for three samples is 21.7.

* Copies of the Dale-Chall Formula, the Dale List, and the Fry Graph are included with this report.

TABLE I

DALE-CHALL FORMULA AND FRY GRAPH READABILITY ANALYSES of FOOD STAMP NOTICE, PAGE ONE

SAMPLE NUMBER	DALE-CHALL FORMULA ANALYSIS				FRY GRAPH ANALYSIS			
First Word Last Word	Number of Words In Sample	Average Sentence Length	Percent of Unfamiliar Words	Raw Score	Corrected Grade Level	First Word Last Word	Average Number of Sentences	Number of Syllables
1 If Changes	107	21.4	20.56	7.99	9-10 +	If For	4.6	146
2 If Page	116	23.2	16.38	7.30	9-10	If Rights	4.5	155
3 If 2	103	20.6	23.30	8.31	11-12	If Described	4.7	174
Average for Three Samples					7.87	9-10 +	4.6	158
								11

The percent of unfamiliar words in the three samples ranges from a low in Sample 2 of 16.38 to a high in Sample 3 of 23.30. The average per cent of unfamiliar words for the three samples is 20.1%. This figure shows that according to the Dale List of 3,000 Words, one in approximately every five words is unfamiliar.

The lowest raw score, 7.30, is found for Sample 2 and can be interpreted as somewhat above 9th grade level. The raw score for Sample 1, 7.99, is exactly between 9-10 and 11-12 grade level band raw scores and can be interpreted as high tenth or low eleventh grade level. The raw score for Sample 3, 8.31 is somewhat higher than eleventh grade level. For the three samples, the average raw score, 7.87, is very close to the upper limits of the 9-10 corrected grade level band raw score (7.9) indicating that the average grade level of this text is high tenth grade or low eleventh grade level.

Fry Graph Analysis: Three samples from Page One of exactly 100 words were analyzed by the Fry Graph. Each sample begins with the same word as do samples analyzed by the Dale-Chall Formula. Average results of the samples, shown in Table I are: number of sentences estimated to the nearest tenth — 4.6; number of syllables — 158. The intersecting point of these two figures on the graph indicates that the approximate grade level for this passage is eleventh grade.

Results of the readability analyses for Page One from the two readability measures are quite similar. In order to read and understand Page One at a generally acceptable level, individuals would need to have achieved a reading ability level as demonstrated on a standardized reading test of at least high tenth and probably eleventh grade level. To read the least difficult sample from this passage would require a reading ability of above a ninth grade level.

TABLE II
DALE-CHALL FORMULA AND FRY GRAPH READABILITY ANALYSES
of
FOOD STAMP NOTICE, PAGE TWO

DALE-CHALL FORMULA ANALYSIS					FRY GRAPH ANALYSIS						
SAMPLE	NUMBER	First Word Last Word	Number of Words In Sample	Average Sentence Length	Percent of Unfamiliar Words	Raw Score	Corrected Grade Level	First Word Last Word	Average Number of Sentences	Number of Syllables	Approximate Grade Level
1	Recent Actions		103	17.2	26.21	8.59	11-12	Recent Disagree	4.8	174	
2	If Office		120	20.0	20.08	7.98	9-10 +	If If	4.0	149	
Average for Two Samples						8.29	11-12		4.4	161.5	12

Readability Analysis of Page Two — Orange Card (Table II)

Dale-Chall Formula Analysis: Two samples of approximately 100 words were selected from the 284 words in the text of Page Two, one at the beginning and the other toward the end. Data in Table II show that the average sentence lengths for these two samples are 17.16 and 24.0. The sentence length average for Sample 1 is somewhat low because the reference (Food Stamp Manual Citation: 106 Cmr:364.400) was counted as a sentence. Overall, the average sentence length for Page Two is 20.58.

The percentages of unfamiliar words in the two samples are 26.21 and 20.0, an average of 23.10. Thus, one in between four or five words in this passage is unfamiliar according to the Dale List of 3,000 Words.

The raw score for Sample 1 is 8.59 and can be interpreted as low twelfth grade level. The raw score for Sample 2, 7.98, is between the 9-10 and 11-12 grade level bands and can be interpreted as high tenth grade or low eleventh grade level. For the two samples, the average raw score is 8.29, indicating that the average grade level of this passage is above an eleventh grade reading level.

Fry Graph Analysis: Two samples of text from Page Two of exactly 100 words were analyzed by the Fry Graph. Samples begin with the same word as the samples analyzed by the Dale-Chall Formula. The average results of the two samples, shown in Table II, are: number of sentences estimated to the nearest tenth — 4.4; number of syllables 161.5. The intersecting point of these two figures on the graph indicates that the approximate grade level for Page Two is twelfth grade.

Results of the readability analyses of Page Two using two readability measures are relatively similar — Dale-Chall Corrected Grade Level of over eleventh grade and Fry Graph Approximate Grade Level of twelfth grade. The slightly higher Fry Graph score probably comes from the fact that the Graph counts one syllable for each number in the text. Thus,

the inclusion of the reference in the Food Stamp manual mentioned on the previous page accounted for twelve additional syllables. The Dale-Chall Formula, on the other hand, counts numbers as familiar. These analyses of Page Two indicate that to read and understand the text included on this page at a generally accepted level would require a reading ability level as demonstrated on a standardized reading test equal to at least an eleventh grade and more than likely a twelfth grade level. To read the least difficult sample from this passage would require a reading ability of high tenth or low eleventh grade level.

Qualitative Analysis of Vocabulary

To further evaluate the vocabulary used in the text of the Food Stamp Notices, a more qualitative analysis was made for the samples from Page One and Page Two used in the readability analyses.

Table III shows words from each sample that are unfamiliar according to the Dale List of 3,000 Words. Words are listed in the order of their appearance in the samples. Unfamiliar words were differentiated by whether they seem to be critical to understanding of the topic presented or whether they could be replaced by easier, more familiar words and still convey a similar meaning. The percentages of words judged to be critical and non-critical within each sample is also shown.

As can be seen in Table III, three of the five samples contain a greater percentage of non-critical words than critical words. One sample — Sample 2, Page Two — has an equal percentage of critical and non-critical words. One sample — Sample 2, Page One has a greater percentage of critical words than non-critical words. It is interesting that this sample has the lowest readability score of the five samples analyzed and the second least difficult sample is Sample 2, Page Two, mentioned above.

TABLE III

WORDS ON FOOD STAMP NOTICE, PAGES ONE AND TWO CONSIDERED UNFAMILIAR BY THE DALE LIST OF 3,000 WORDS
SUBJECTIVE CLASSIFICATIONS OF PROBABLE CRITICALNESS TO THE SUBJECT

Page of Notice and Sample Number	Unfamiliar Words Probably Critical to Understanding the Subject	Percent of Unf. Words	Unfamiliar Words Probably Non-Critical to Understanding the Subject	Percent of Unf. Words
PAGE ONE				
Sample 1	ATP; benefit, appeal, appeal, benefits, appeal	27.3%	information, specific, information, re- flected, reduction, concerning, reduc- tion, prior, prior, reduction, result, omission, extended, reinstated, prior, regarding	72.7%
Sample 2	ATP, benefits, appeal, benefits, ap- pealed, appeal, benefits, appeal, ap- peal, appealed, appeal	57.9%	terminated, effective, prior, basis, prior, continued, reinstated, contained	42.1%
Sample 3	ATP, benefits, benefit, certification, recertified, appeal, Department's, benefits, appeal	37.5%	reflects, reduction, resulting, effective, supplement, prior, notified, period, action, situation, action, entitled, con- tinuation, pending, refers	62.5%
PAGE TWO				
Sample 1	Federal, benefits, per cent, house- hold's(?) benefits, Federal, benefits, benefits, manual, citation, CMR	45.8%	recent, program accordance, deduc- tion, lowered, reduction portion, determining, eligibility, result, re- duced, eligible, terminated	54.2%
Sample 2	appeal, denied, Department, benefits, appeal, appeal, request, denied, re- quest, Division, benefits, Welfare	50.0%	recover, process, action, within, en- closed, pre-printed, concerning, cor- rectness, computed, process, contact, local	50.0%

Another interesting aspect of this qualitative analysis of vocabulary is that words judged critical to the meaning of the Food Stamp Notices are often the same for all samples. Overall, sixteen words, or derivations of these sixteen words, make up the total judged as critical to understanding meaning.

Some words that appear on Page One and Page Two of the Food Stamp Notices, although included on the Dale List and thus counted familiar, are used in this text to represent concepts that may be quite different from their more common meanings and therefore, may pose additional difficulty for the average reader. Examples of such words are *heard*, *earned*, *right*, *file*, *fair*, and *hearing*. Considering that these words seem to be used in a technical, even legalistic way, their appearance seems to suggest that the Food Stamp Notices may be even more difficult than the readability formulas indicate. Furthermore, the qualitative analysis of unfamiliar words suggests that a great contribution to difficulty comes from words that might possibly be replaced with more familiar, less difficult words. Thus, the difficulty level of the Food Stamp Notices may be lessened without loss of meaning. For example, the following sentence from Page Two contains eight unfamiliar words:

"If you have questions concerning the *correctness* of your benefits *computation* or the fair hearing *process*, *contact* your *local welfare* office."

One wonders if the sentence might not also read:

"If you have any questions about how your *benefits* are figured or about asking for a fair hearing, be sure to call or write the *Welfare* Office closest to your home."

Qualitative Comparison of Sentence Length

Average sentence length in the three samples from Page One were 20.6, 21.4, and 23.2, and in the two samples from Page Two, 17.2 and 24.0. For Page One, the average sentence length is 21.7 and for Page Two, 20.58. To get a feeling of

TABLE IV

COMPARISON OF AVERAGE SENTENCE LENGTH
of
FOOD STAMP NOTICES, PAGE ONE and PAGE TWO
and

PASSAGES OF KNOWN DIFFICULTY
(Scales for Reading Assessment)

AVERAGE SENTENCE LENGTH FOR SCALES			AVERAGE SENTENCE LENGTH FOR FOOD STAMP NOTICES			
Scales	7-8 Grade Level	9-10 Grade Level	PAGE ONE	A.S.L.	PAGE TWO	A.S.L.
Literature	15.6	18.1	Sample 1	21.4	Sample 1	17.16
Astronomy	16.7	20.7	Sample 2	23.2	Sample 2	24.0
Biology	16.5	20.9	Sample 3	20.6		
Narrative History	19.3	24.7				
Expository History	16.4	20.4				
Average	16.9	20.5		21.7		22.3

26

27

the difficulty of sentences of this length; it seems helpful to compare them with sentence length in passages whose difficulty levels have been tested. Table IV presents a comparison between the average sentence length of the Food Stamp Notices and the Scales for Reading Assessment, a set of passages from five subject areas representing a gradation in difficulty. In Table IV, it can be seen that for the Scales, the average sentence length for passages known to be at seventh to eighth grade reading level is 16.9; for passages known to be at ninth to tenth grade reading level, the average sentence length is 20.5. The average sentence lengths for samples from Page One and Page Two are five to six words longer than 7th to 8th grade passages and about two words longer than 9th to 10th grade passages. This data seems to support the earlier readability analyses that the Food Stamp Notices are written at above a tenth grade reading level.

Many sentences in the Food Stamp Notices are quite long. Take, for example, the following:

"If you have already appealed on the basis of the prior notice, that appeal will be heard and your Food Stamp benefits will be continued at the reinstated level until the appeal is decided, and you need not file a second appeal at this time."

In this sentence, taken from Page One, are forty-five words. This sentence could easily be written in at least three sentences without losing meaning or continuity, or even changing words.

"If you have already appealed on the basis of the prior notice, that appeal will be heard. Until the appeal is decided, your Food Stamp benefits will be continued at the reinstated level. You do not need to file a second appeal at this time."

Qualitative Impressions of the Food Stamp Notices

Earlier in this paper, it was pointed out that readability formulas do not account for all aspects of difficulty. One of these aspects is organization — at the level of a book, chapters in a

book, paragraphs, or sentences. Books, chapters, and paragraphs that are well organized present information in a manner that can be logically followed. For example, paragraphs usually present topic sentences and related information in the same or subsequent paragraphs. Such organization does not consistently appear on the notices in question. To illustrate, essentially the same information is given in Paragraph 1 and again, in Paragraph 5 of Page One.

Furthermore, the fact that December Food Stamp benefits will remain the same for everyone, no matter if a December ATP was or was not received, is difficult to ascertain for references to this information are scattered through the text. References on Page One to information on Page Two further detract from a logical organization of the information presented. It seems that the contents of the two cards could be combined. One might even consider placing the complete message in English on one card — back and front — and the Spanish version on another, back and front.

Overall, information in the Food Stamp Notices is very difficult to follow. A great many conditional statements are presented that would make extremely high processing demands on a reader. Although some information is repeated, it also seems that other necessary information is omitted. For example, it does not seem clear whether those who did not receive a December ATP and those whose certification ends December 31, 1981 are the same or different groups. Are the ending of a certification period and the termination of benefits the same?

Furthermore, there seems to be conflicting information presented in the text of these notices. The entire text is about reductions or terminations of Food Stamp benefits. Yet, the final statement on Page One states that "this is *not* an additional reduction in your Food Stamp benefit amount."

The text also goes to great length to give the dates when appeals may be made. It seems that it would be easier to give a

specific date such as January 5, 1982, than to say "within 10 days of the date shown on this card". Does this mean including this date or ten days after this date? Specifics of appeals and consequences of appeals are discussed in detail. The text says that you may not appeal after ninety days beyond the date on the card, which one assumes is March 26, 1982. Yet, information is then found stating that you can appeal *at any time*, if you think you are not receiving the food stamps that you should.

Finally, in reading the Food Stamp notices, one gets the impression of reading a legal document. The tone, style, and linguistic structure of the text give a feeling to this writing similar to that of an insurance policy or a mortgage contract. It would seem unlikely that the population, for whom information about Food Stamp benefits is imperative, would have acquired the skills necessary to read and understand this specialized, technical text.

THE LITERACY OF WELFARE CLIENTS

MARC BENDICK, JR., and MARIO G. CANTU, *Urban Institute*

About 75 percent of the U.S. poverty population can offer reading skills at no higher than an eighth-grade level. The procedures and documents of many public welfare agencies require far higher levels of skill, in a sample of eighty-one documents only 11 percent were judged accessible to those with eighth-grade skills. This mismatch contributes to high administrative error rates as well as hampering enrollment by clients and equitable distribution of benefits. More realistic literacy requirements in written materials and more active outreach in agency procedures would benefit both clients and agencies.

Low-income persons in the United States may be eligible for benefits under many needs-tested assistance programs, including AFDC, food stamps, Supplemental Security Income (SSI), general assistance, Medicaid, and Section 8 rent supplements. However, individuals receive such benefits only after completing a process of enrollment and eligibility determination and while continuing to comply with the process of periodic redetermination of eligibility. These processes involve literacy skills—reading and writing—in completing forms, providing documentary proof of eligibility, comprehending explanatory brochures, and complying with written notices. Yet the relationship between low income and lack of education is well known. Furthermore, some persons eligible for public assistance may be in that situation precisely because of their inability to deal successfully with such processes—for example, in applying for jobs. Hence the questions arise: What literacy skills can be assumed of welfare clients? To what extent do current agency administrative procedures accommodate to limited literacy? And what consequences arise from mismatches between the skill levels which agencies require and those which clients can supply?

These questions are the subject of this study: Section I summarizes what is known about functional literacy levels among potential welfare clients, reflecting the influence of low educational achievement, age, and foreign-language background. Section II presents data on reading-skill levels required to deal with the forms and brochures in six assistance programs. Section III then examines the consequences of unrealistic literacy requirements on agency performance and client service. Finally, Section IV discusses some alterations in agency practices suggested by these findings.

I. THE LITERACY OF THE POVERTY POPULATION

Throughout this paper, we use the U.S. poverty population as a proxy for the client population of public assistance programs. We do so because we wish not to confine attention to any particular program but, rather, to include the whole range of agencies and procedures with which persons seeking assistance might have to deal. We do so also because data on the literacy of the client population of public assistance programs are scarce, making census data on the poverty population an important source of information.

Table 1 indicates the number of school years completed by heads of families in poverty in the United States in 1970. Fifty-one percent of the families were headed by persons who had completed eight years of school or less, another 40 percent

Table 1

YEARS OF SCHOOL COMPLETED BY HEADS OF FAMILY FOR FAMILIES IN POVERTY, 1970.

Years of School Completed by Family Head	Percentage of Families in Poverty	Cumulative Percentage of Families in Poverty
Fewer than eight	35	35
Elementary school graduate	16	51
One to three years of high school	22	73
High School graduate	18	91
One to three years of college	6	97
College graduate	3	100
Total	100	100

were headed by persons who had completed some years of high school or who had graduated from high school, and 10 percent were headed by persons with at least some college education. The median years of school completed was 8.9.

These data present an overestimate of the actual educational skill levels which the poverty population possesses, however. This is true because persons who eventually become school dropouts tend to fall behind their classmates in educational achievement prior to dropping out: the average person who has completed only eleven years of school cannot perform at an eleventh-grade level.

Table 2 summarizes the results of five studies of educational achievement which illustrates this pattern.² Let us focus on the Gates Reading Test study (fourth row of the table) as an example. This study estimated that, among the tenth-grade students tested, those students who eventually graduated from high school possessed reading skills of approximately tenth-grade level, but those students who subsequently did not graduate lagged 1.8 years behind in reading skills: that is, they could read at only a little better than an eighth-grade level. The five studies together indicate that eventual dropouts are

Table 2

SKILL-LEVEL DIFFERENCES BETWEEN SCHOOL DROPOUTS AND EVENTUAL HIGH SCHOOL GRADUATES

Study	Skills Examined	Grade Level of Study Population	Skill Differ. (in School Yrs.) between Eventual Dropouts and Eventual Graduates
Iowa Test of Education Development, 1950-52	General educational development	9	1.6
Project Talent, 1960	Reading comprehension	9	1.5
Bloomington, Minnesota, 1961	General educational	9	2.4
Gates Reading Test, 1966	Reading	10	1.8
Health Examination Survey, 1966	Reading	12	1.9

more than one year behind in the ninth grade, nearly two years behind in the tenth grade, and more than four years behind in the twelfth grade. Hence, the average person who never graduated from high school should not be assumed to possess more than an eighth-grade literacy-skill level.

With this rule of thumb, we can now reexamine the data in table I to produce a more realistic estimate of poverty-population literacy than is provided by school-achievement data alone. Table I indicates that 35 percent of poverty-family heads never completed eight grades of school, and an additional 16 percent only completed eight. To this 51 percent of family heads who clearly possess no more than eighth-grade skills (35 + 16 percent), we should add the 22 percent who completed from one to three years of high school. This produces an estimate that 73 percent—almost exactly three-quarters—of all heads of families in poverty should be assumed to offer at most an eighth-grade reading-skill level. We shall use this level for the remainder of this paper as an upper limit of what can plausibly be assumed for the majority of welfare clients.

Those few studies which test the literacy skills of actual public assistance recipients concur with these census-based estimates. A study of 680 recipients of AFDC and general assistance was conducted in the Woodlawn area of Chicago in 1962. It found that 42 percent of interviewees claimed to have completed eight grades or fewer of schooling, and an additional 45 percent claimed to have completed some high school but not to have graduated; these two categories account for 87 percent of recipients. Furthermore, reading-skill tests showed that those who had claimed schooling of eight years possessed actual reading skills corresponding to 5.3 years of school, while those who claimed twelve years of school actually read at a level corresponding to 7.5 years of school. A parallel study of 777 recipients in East St. Louis, Illinois, the following year found 60 percent of respondents claiming eight years of

schooling or less and an additional 30 percent claiming some high school but not graduation; this study also confirmed that the actual reading-skill level of this group—90 percent of recipients surveyed—fell behind their claimed years of school completed by as much as 4.3 year-equivalents. Thus, even supposed high school graduates were functioning at lower than an eighth-grade level.

Literacy limitations of welfare clients based on low educational achievement are often compounded by foreign-language problems. As estimated in the Current Population Survey of July 1975, 14.5 million persons in the United States aged nineteen and over live in households in which languages other than English are spoken and speak languages other than English as either their first or second language. This represents approximately 10 percent of the total U.S. population aged nineteen and over and may be assumed to be at least that high a proportion of the poverty population and welfare clientele.

A second element compounding the relationship between literacy and poverty is age. Persons aged sixty-five and over comprise about 25 percent of the U.S. poverty population and

Table 3

YEARS OF SCHOOL COMPLETED BY HEADS OF FAMILIES IN POVERTY, BY AGE, 1970

YEARS OF SCHOOL COMPLETED BY FAMILY HEAD	FAMILIES WITH HEAD AGED 25-64		FAMILIES WITH HEAD 65 OR OLDER	
	%	Cumulative %	%	Cumulative %
Fewer than eight.....	32	32	54	54
Elementary school graduate	14	46	23	77
One to three years of high school	24	70	11	88
High school graduate.....	21	91	7	95
One to three years of college.....	5	96	3	98
College graduate.....	4	100	2	100
Total	100	100	100	100

SOURCE—see table 1 n

therefore deserve special attention. Table 3 displays data on the years of school completed by persons who are heads of families in poverty, separately for persons under age 65 and those above. Fifty-four percent of the elderly poor-family heads had fewer than eight years of school, an additional 23 percent were elementary school graduates, and a further 11 percent had some high school education but had not graduated. This represents 88 percent of elderly-poor family heads who, according to the adjustment discussed in table 2 should be expected to have available at most an eighth-grade reading level.

II. LITERACY REQUIREMENTS OF PUBLIC PROGRAMS

Having estimated welfare clients' available literacy skills, we can now compare these with the skill levels required for claiming public assistance. Virtually the only formal study of this subject is a recent one of the readability of twenty forms and brochures utilized by the Illinois Department of Public Aid. In that study, literacy requirements were estimated using the Dale-Chall formula, which takes account of average sentence length and the proportion of words in a passage which are to be found on a list of 3,000 familiar words.

The results of that study are summarized in the first row of table 4. There we see that 50 percent of the brochures and forms which Illinois clients are expected to read actually require the literacy skills of either a college graduate or someone who has attended college for at least some time. Only 15 percent of the documents were accessible.

To expand the sample available from the Illinois study, we obtained client documents from five additional public aid agencies or programs; the public assistance agencies in the District of Columbia, Maryland, and Virginia (covering AFDC, general assistance, food stamps, and Medicaid), the Social Security Administration (covering SSI), and local housing authorities in Atlanta, San Antonio, and Cambridge, Massachusetts, administering the Section 8 rent-supplement

program. We included in our sample only documents which clients are normally expected to read or fill out without assistance by agency caseworkers. Each document was evaluated for readability using the Dale-Chall formula, with the results displayed in the remaining rows of table 4.

The pattern in the results is the same as that indicated by the Illinois data alone: The documents require substantially higher reading levels than clients possess. When all eighty-one documents from all six programs and agencies are considered together, 32 percent of the documents require some college or college-graduate reading levels, and only 11 percent are accessible to those at an eighth-grade reading level. The most accessible program in the sample, SSI, still makes only 22 percent of its documents available to eighth-grade readers. The least accessible program is Section 8 rent supplements, with all its documents requiring the reading skills of at least a high school graduate.

Perhaps the most vivid sense of the situation faced by low-literacy clients can be given by passages from the sampled documents themselves. An applicant for Section 8 rent supplements in San Antonio, for example, would be given the following written explanations of a major aspect of the way his rent subsidy is calculated:

As an incentive to the Family to find the most economical housing suitable to its needs and subject to the other provisions of this paragraph (b), if the Family selects a dwelling unit for which the proposed monthly lease rental, plus any applicable allowances, is below the applicable Fair Market Rent, the Family will be given a rent credit by reduction in its Gross Family Contribution. The amount of this credit will be that percentage of the Gross Family Contribution which Rent Saving is of the Fair Market Rent. The Rent Saving is the amount by which the Fair Market Rent exceeds the monthly lease rental (plus any applicable allowance) approved by the Agency.

A Medicaid client in the District of Columbia would have his eligibility explained to him as follows:

The State Plan permits eligibility to be retroactive three months prior to the month of application if you were eligible on the date you received medical care or service. . . . Care card holders may only attend medical facilities of the D.C. Department of Human Resources or be hospitalized in specific hospitals with whom the District government has a contractual agreement.

Finally, social service clients in Maryland are informed that

The social service program will not, directly or through contractual or other arrangements, on the grounds of race, color or national origin . . . treat an individual differently from others in determining whether he satisfies any eligibility or other requirement or condition . . . [or] deny any individual opportunity to participate in any program, through the provision of services or otherwise; or afford him opportunity to do so which is different from that afforded others under the program.

The forms from which the first and last quotations are drawn require the skills of a college graduate, while the second passage is from a form requiring the skill level of a person with some college education.

III. CONSEQUENCES OF THE MISMATCH

What are the consequences of a mismatch between welfare clients' ability to read and agencies demands for client literacy? We speculate that it contributes to at least three undesirable program outcomes: discouragement from enrolling of persons eligible for benefits, inequity in the distribution of benefits among enrollees, and high agency error rates. We must characterize this contention as speculation because the actual variable which we can link to program outcomes is

client literacy levels rather than the gap between client literacy and agency requirements per se. We therefore are assuming that low client literacy levels correspond (at least approximately) to a large gap. While the evidence in table 4 seems to support this assumption by showing that the phenomenon of mismatch is widespread, we must be careful to note this link in the argument.

Let us begin with the consequences of the literacy gap for agency administrative orderliness. In a recent study of the quality control system at AFDC, Bendick and his colleagues found a substantial relationship between agency errors in eligibility determination and benefit computation and the years of school completed by AFDC clients. Nationwide in 1970, AFDC clients' median years of schooling was 10.8 years. It was estimated that, for each additional year of schooling of the average client, the proportion of AFDC cases with errors would drop three-quarters of a percentage point. The state with the highest median AFDC recipient education was New Hampshire, with 12.6 years; if the national average client educational level were as high as New Hampshire's, the national case-error would be 1.4 percentage points lower. This 1.4 percentage change would represent elimination of one error in twenty in the nation.

Of course, the educational level of recipients is not subject to change of this sort. However, we may speculate that, at least in part, the origin of errors is not low literacy skills per se; rather, it is the gap between actual client skills and agencies' expectations. To the extent that this assertion is correct, equivalent elimination of mispayments and payments to ineligible persons may be achieved by closing the gap through changes in agency documents and procedures.

At the opposite end of the spectrum from the problem of erroneous payments to persons not eligible for benefits is that failure of persons who are eligible to enroll for benefits. Inability to read posters and brochures informing them of the

availability of benefits may screen out potential recipients at the very first step of the enrollment process. One piece of evidence suggesting that this occurs is provided by a survey of 156 heads of households in low-income neighborhoods of Baltimore in 1964. These persons, who had never received public assistance, were asked if they knew the agency name or the location where a needy person could receive "welfare money." Of those persons who were high school graduates, 88 percent knew the correct answer to the question, while of those who had eight years or fewer of education only 60 percent knew. This pattern holds even when income and thus eligibility for benefits is controlled for.

After a client has learned of a program and has applied for benefits, the next stage at which a literacy mismatch may interfere is in the processing of an application. In the study of AFDC quality control cited previously, an index was created to represent the procedural accessibility of AFDC benefits to applicants. It incorporated four measures of accessibility: the proportion of AFDC applications denied for failure to comply with agency procedures, the proportion of ongoing cases terminated for failure to comply with agency procedures, the proportion of ongoing cases receiving an erroneously low benefit payment, and the proportion of applications received during a calendar quarter for which approval or disapproval was delayed beyond the end of the quarter. Drawing on state data for each of the fifty states and the District of Columbia in the years 1974-76, Bendick and his colleagues found that the lower the average educational levels of AFDC clients, the lower was the index of accessibility; for each decrease of one year of schooling that the average client in a state possessed, the state's accessibility index decreased 2 percent. Similarly, the higher proportion of Spanish-speaking clients in a state, the lower its accessibility; for each additional percent of the state's population which was of Spanish origin, the state's accessibility index decreased 0.7 percent. Thus, assuming that

a low educational level of clients and non-English-speaking clients corresponds to a greater gap between clients' literacy skills and agencies' requirements, we can conclude that payment delays, erroneously low payments, and payment denials to those entitled to them increase as the literacy mismatch increases.

To the extent that the literacy-skill gap screens out a disproportionate number of lowest-educated persons at the information and application stage, and to the extent that lowest education is associated with lowest income, then the literacy-skill gap contributes to perverse distribution of benefits; the more needy a potential recipient, the less likely he is to receive benefits. This inequitable pattern may be reinforced by the effect of the literacy gap on benefit decisions by agency caseworkers after a case is accepted. A study of the experiences of sixty-eight female AFDC clients in New York City illustrates the phenomenon. That study examined the proportion of caseworkers' discretionary case decisions (for example, granting special needs allowances or waiving documentary proof of claims) which had an outcome favorable to clients; it then related those proportions to various indicators of clients' "bureaucratic competence." The results are summarized in table 5. On five different measures of bureaucratic competence—years of schooling completed, experience in occupations requiring literacy skills, experience in filling out income tax forms, and two estimates of evidence of understanding bureaucratic vocabulary—the pattern was the same: The more bureaucratic and literacy skills the client possessed, the more likely were decisions to be made favorable to the client. Higher benefits and easier access to benefits then accrue not to the most needy clients but to the most adept, who are often the least needy. Only a literate minority of welfare clients can effectively demand their full benefits in an environment where agency processing requires high levels of literacy.

IV. CLOSING THE LITERACY GAP

Several approaches might be used to close the gap between client literacy skills and agency requirements.

The most straightforward of these is for agencies to rewrite their forms and brochures. It would seem that an eighth-grade reading level should be the upper limit to what the majority of clients can be expected to comprehend. The Dale-Chall test can easily be applied by agency personnel to evaluate documents for vocabulary and sentence complexity. Type size and page format are also important, particularly for programs with elderly or disabled clients.

Redesign of documents should be accompanied by re-examination of agency procedures. Where possible, written notices and brochures might be replaced by oral interviews. Outreach efforts to recruit potential applicants should not rely heavily on written posters or brochures. Paraprofessional client-advocacy workers might be available to all clients to provide counseling and assistance in the application process.

In the longer run, consideration might also be given to the simplification of the programs themselves. In many cases, the complexity of questions and explanations simply reflects complexities of program design. Concern with accurately targeting benefits to the "truly needy" by detailed, sophisticated eligibility rules must be counterbalanced by recognition of the tendency of those same complex eligibility rules to screen out persons of high need but low literacy.

In the final analysis, however, the solution may be with clients rather than with agencies. Just as illiteracy hampers clients in the public welfare process, so it handicaps them in many aspects of their lives—as workers, consumers, and citizens. The response of Cook County to the findings of their client literacy study cited in the first section of this essay was to establish a program of mandatory literacy training for nonliterate clients. In 1963, this program enrolled more than 8,000 persons. By 1975, forty-three states were funding some

form of education and training under Title XX social services, enrolling 197,000 persons. This approach might be expanded by such means as adding literacy training to the set of Title XX services which states are required to offer to public assistance clients. Agencies (through lower error rates), clients, persons currently unable to become clients, and society at large all stand to gain from such investment.

COMMONWEALTH OF MASSACHUSETTS - DEPARTMENT OF PUBLIC WELFARE PAGE 0100

FSP-902 REGION 07 WSU 314 SUCURKER 00601 FOOD STAMPS ATP ISSUANCE UPDATE LISTING REPORT FOR 11/25/81

CAT	SEN	NAME	STREET	RA CE	COUP HH	OLD	NEW	I EARNED	N UNEARN	U DASDI	CHILD CARE	SHELTR	UTILITY	LO	UT CERT DATES BEGIN	END	MED EXP	ERR LO	LO	APL
9				5	02	094	094	.00	312.50	.00	.00	300.00	.00	1	810801	811031	000.00	B		R
9				5	04	075	075	.00	727.94	.00	.00	300.00	379.00	2	811201	811231	000.00	B		R
9				5	01	019	019	.00	311.00	.00	.00	142.44	358.00	2	811201	820228	000.00	B		R
9				5	01	059	059	.00	322.47	.00	.00	49.00	270.00	2	811001	811231	000.00	2	B	R
9				3	01	059	059	150.00	.00	.00	.00	.00	.00	0	810901	811031	000.00	B		R
9				4	04	156	156	43.33	422.52	.00	.00	155.00	270.00	2	811001	811231	000.00	B		R
9				5	01	010	010	.00	333.00	.00	.00	53.63	105.00	2	810801	811031	000.00	B		
9				5	02	054	054	.00	140.52	201.40	.00	65.00	143.00	2	811001	820930	000.00	2	B	R
9				1	02	073	073	.00	382.50	.00	.00	202.00	236.00	2	810901	820531	000.00	B		R
9				3	05	170	170	.00	444.00	.00	.00	.00	105.00	2	810801	811031	000.00	B		
9				5	08	257	257	43.33	705.19	.00	.00	300.00	358.00	2	811201	820228	000.00	B		R
9				2	03	081	081	.00	541.62	.00	.00	187.21	356.00	2	811201	820228	000.00	B		R
9				4	01	070	070	.00	74.01	257.70	.00	235.48	276.00	2	811001	820430	000.00	2	B	R
9				5	02	043	043	.00	368.44	.00	.00	90.00	12.00	4	811101	820131	000.00	2	B	R
9				5	01	023	023	.00	277.00	.00	.00	26.47	105.00	2	810801	811031	000.00	B		
9				5	02	050	050	.00	.00	350.40	.00	20.60	117.00	2	810601	811130	000.00	3	B	
9				5	03	113	113	.00	433.33	.00	.00	167.25	273.00	2	811001	811231	000.00	B		R
9				5	02	040	040	.00	73.55	476.30	.00	132.33	270.00	2	811001	811231	000.00	3	B	R
9				5	04	123	123	.00	.00	382.30	.00	242.63	105.00	2	810401	811031	000.00	3	B	
9				5	01	034	034	.00	63.00	227.00	.00	100.00	117.00	2	810601	811130	000.00	3	B	
9				2	04	127	127	.00	541.00	.00	.00	224.00	105.00	2	810801	811031	000.00	B		
9				5	03	084	084	.00	465.00	.00	.00	68.00	170.00	2	810901	811130	000.00	B		
9				5	02	035	035	.00	395.94	240.00	.00	225.00	293.00	2	811101	820430	000.00	2	B	R
9				5	01	068	068	.00	.00	260.60	.00	27.26	226.00	2	810801	820131	000.00	3	B	
9				5	02	062	062	.00	243.60	285.30	.00	245.68	276.00	2	811001	820430	000.00	2	B	R

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COMMONWEALTH OF MASSACHUSETTS - DEPARTMENT OF PUBLIC WELFARE PAGE 8374

FSP-902 REGION 02 MSU 116 SCHWABER 00600 FUDU STAMPS ATP ISSUANCE UPDATE LISTING REPORT FOR 11/25/81

CAT	SSN	NAME	STREET	NA CE	C MM	O UP	I OLD	N NEW	E EARNED	C UNEARN	U MSU	CHILD CAKE	UT SHELK	UT UTILITY	UT CD	UT CERT	UT DATES	UT BEGIN	UT END	UT EXP	UT CU	UT CD	UT APL
9	06	138	131	1059.50	.00	.00	.00	500.00	358.00	2	811201	820228	000.00	L	R								
9	01	033	031	261.97	.00	.00	.00	93.33	.00	1	810901	811031	000.00	L	R								
9	02	010	000	.00	.00	005.50	.00	120.00	234.00	2	811001	820630	000.00	2	L	R							
9	04	127	123	693.00	.00	.00	.00	406.00	170.00	2	810901	811130	000.00	L									
9	02	010	005	81.33	.00	554.92	.00	107.00	255.00	2	811001	820531	000.00	2	C	R							
9	05	171	166	093.26	.00	.00	.00	227.00	270.00	2	811001	811231	000.00	L	R								
9	06	211	204	1110.00	.00	.00	.00	309.24	270.00	2	811001	811231	000.00	L	R								
9	07	064	059	012.09	444.30	.00	.00	200.00	222.00	2	810901	811231	000.00	L	R								
9	09	265	259	978.00	.00	.00	.00	21.00	105.00	2	810801	811031	000.00	L									
9	03	033	028	537.07	210.05	.00	.00	118.52	222.00	2	810901	811231	000.00	L	R								
9	03	063	058	751.24	.00	.00	.00	205.00	170.00	2	810901	811130	000.00	L	R								
9	02	010	009	.00	.00	339.50	.00	.00	217.00	2	811001	820731	000.20	1	L	R							
9	01	033	030	375.23	.00	.00	.00	200.00	.00	1	811001	811231	000.00	L	R								
9	02	048	096	311.00	54.00	.00	.00	142.00	105.00	2	810801	811031	000.00	L									
9	02	075	072	404.46	.00	.00	.00	103.19	.00	1	810901	811130	000.00	L	R								
9	07	167	160	1004.59	.00	.00	108.22	272.00	347.00	2	811101	820131	000.00	L	R								
9	01	026	024	432.92	.00	.00	.00	112.30	338.00	2	811201	820228	000.00	L	R								
9	04	099	096	133.26	541.03	.00	.00	325.00	238.00	2	811101	811130	000.00	L	R								
9	03	065	062	635.30	03.57	.00	.00	225.00	350.00	2	811201	820228	000.00	L	R								
9	02	055	052	554.01	.00	.00	88.86	225.00	170.00	2	810901	811130	000.00	L	R								
9	01	024	021	441.90	.00	.00	.00	165.00	170.00	2	810901	811130	000.00	L	R								
9	01	070	069	227.00	.00	.00	.00	130.00	.00	1	811201	811231	000.00	L	R								
9	04	044	042	331.25	210.05	.00	.00	33.00	185.00	342.00	2	811201	820131	000.00	L	R							
9	06	164	179	665.04	.00	.00	.00	200.00	358.00	2	811201	820228	000.00	L	R								
9	03	077	072	693.26	.00	.00	.00	76.00	358.00	2	811201	820228	000.00	L	R								

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AP-81-49

DATE: 12/18/81

TO: ASSISTANCE PAYMENTS STAFF
FROM: DUNCAN MACEachern, ASSISTANT COMMISSIONER,
ELIGIBILITY OPERATIONS

RE: 12/1/81 Food Stamp Changes—Automatic Closings/
Reductions

On December 16, 1981 the United States District Court issued a Temporary Restraining Order (TRO) in the case of Foggs v. Block. The issue in this case is related to the computer generated notice that was sent to those cases affected by the implementation of the 130% of Gross Income Policy or the policy which changed the earned income deduction from 20% to 18%. The judge ruled that the notice was insufficient since it did not specify the date it was mailed, therefore clients could not adequately determine when the ten (10) day appeal period began. The court has ordered that all cases have their December benefits restored to the November benefit level and have a new notice sent to the Recipient. The court order does not affect any individual case actions which have been taken by local offices.

To implement the order of the court the Department is taking the following action:

- All cases closed or reduced due to the above referenced policy changes will be transferred to their November benefit levels. Cases closed will receive an ATP for the same amount as received during November, 1981. Cases which were reduced will receive a supplemental ATP which when added to their December ATP will equal their November benefit level. Cases due a supplemental ATP amount of \$1, \$3 or \$5 will receive an ATP of \$2, \$4 or \$6. These ATP's will be produced and mailed by the computer.

- All cases receiving a supplemental/restored ATP will also receive a new computer notice explaining:
 - The fact that their January benefits will be decreased/terminated as a result of the policy changes.
 - The date that they must appeal by to have their January benefits continued at the December level.
 - The fact that the cases that had previously appealed will have their appeal considered and they need not appeal again.
 - The fact that cases with an end of certification date 12/31/81 will have to be recertified and that they will not be continued at their previous level even if they appeal.

The notices will appear on two cards. The first card will contain information resulting from the court suit while the second card will be a restatement with minor modifications of the first notice. All notices will be in Spanish and English. The notices appear as Attachments 1, 2 and 3.

N.B. CASES WITH AN END OF CERTIFICATION DATE OF 10/31/81 OR 11/30/81 WILL NOT HAVE THEIR BENEFITS RESTORED NOR WILL THEY RECEIVE A NOTICE. THESE CASES SHOULD NOT HAVE RECEIVED THE ORIGINAL NOTICE AS THE ACTION RESULTING FROM THE END OF THE CERTIFICATION PERIOD SUPERCEDED THE NEW CHANGES.

- A printout will be sent to each office listing the cases that were restored or received a supplemental ATP. Included on the printout will be the amount of the new ATP.
- The client notices and ATP's are scheduled to be mailed on 12/26/81.

No further action will be required of local office staff in this matter except to respond to any recipient questions.

Clients that appeal as a result of the new notice will have an appeal scheduled and a supplemental ATP will be issued in January by a special Central Office Unit. A supplemental ATP will be issued on a monthly basis until either the appeal is heard and a decision rendered or until the end of the certification period. Local Offices will receive a list during the week of 1/11/82, or all recipients who filed a timely appeal and the amount of the supplemental ATP. The supplemental ATP's will be issued during the week of 1/11/82.

JG:kah

AP-82-3

DATE: 2/3/82

TO: ASSISTANCE PAYMENTS STAFF

FROM: DUNCAN MACEachern, ASSISTANT COMMISSIONER,
FOR FIELD OPERATIONSRE: 12/1/81 Food Stamp Program Changes — FSP-902 and
FSP-903 Reports

In generating the FSP-902 and FSP-903 Reports based on the 12/1/81 Food Stamp Program changes, problems and unforeseen situations have occurred as a result of unanticipated system modifications and court orders prompted by the *Foggs v. Block* court suit. Information and instructions regarding the consequences of the suit were contained in AP-81-49 and AP-81-50.

The purpose of this memo is to alert field staff to those identified problems with the FSP-902 and FSP-903 Reports and to explain the system which has been developed to handle households who have filed a timely appeal after receipt of the computer generated notice.

Field Staff are to resume the effort to correct cases appearing on the FSP-903 Report immediately. Instructions issued by AP-81-45 should be followed with one exception. Notification letters (Attachment #'s 5, 5A, 6 and 6A) were transmitted by AP-81-45 and were sent to clients by eligibility workers for adverse actions required by the 12/1/81 food stamp changes. *Do not use these letters under any circumstances.* All adverse actions resulting from reviews of cases listed on the FSP-903 are to be initiated using standard adverse action procedures e.g. FSNL-5. The completion date for the FSP-903 is extended to 2/19/82.

I. FSP-902 (ATP ISSUANCE UPDATE LISTING REPORT)

1. Cases terminated for Code A (130%) will reflect an end of certification date of 11/24/81. This is for your information only and requires no action.
2. Category 9 (NPA) cases whose certification period had not expired and which were terminated for Code A (130%) were originally closed *only* in section IV of the Recipient Master File. Since Section III was not closed, these cases were appearing in an active status with no Food Stamp benefits payable. The system has been corrected and cases affected in this manner have been terminated in Section III for action Reason #32. No field action is required.
3. The minimum allotment for household sizes 1 and 2 should have remained unchanged at \$10. The system incorrectly issued ATP's for some household size 2 cases in amounts less than the \$10 minimum.
4. Incorrectly generated ATP's were issued in amounts of \$1, \$3, and \$5. ATP's in these amounts are not negotiable. Vendors were advised not to attempt to transact these incorrect ATP's and to inform recipients they must return the ATP to the local office.

N.B. Phone instructions were issued regarding resolution of items #3 and #4 above. The system error has been corrected and no further action is required.

II. FSP-903 (ATP ISSUANCE ERROR/ACTION REPORT)

1. Category 1 and 3 cases appear on the FSP-903. Since these cases cannot be adjusted by local staff, as their maintenance is the responsibility of the SSI Demonstration Unit, they are to be disregarded.
2. The automatic case closure system for Category 9 food stamp cases with certification periods ending in 10/31/81 or 11/30/81 was run after the new pro-

gram standards were applied to the Recipient Master File. These cases have been closed and should not have appeared on the FSP-903. All cases with an end of certification date of 10/31/81 or 11/30/81 appearing on the FSP-903, that have not timely recertified, require no action.

3. Category 9 cases with an end of certification date of 12/31/81 or 1/31/82 have been closed in the usual manner if timely recertification was not made. No action is required for correction of these cases since the case will either be closed automatically or upon recertification have benefits calculated using new standards.
4. Some household size 3 cases with allotments of \$6, \$7, \$8, or \$9 appear on the FSP-903 Report. These allotments are probably correct. Due to a flaw in the computer program these cases were listed as incorrect and were not recalculated. These cases are to be recalculated using 12/1/81 standards and corrected if in error. If the allotment level is correct, no further action is required.
5. Incorrect SUA amounts were used in generating the FSP-903 Report for cases with certification periods listed below. These SUA amounts are, in fact correct and the cases should not have appeared as being in error.

	Correct SUA Amount
January thru April	\$281
January thru July	\$194
January thru August	\$178
January thru November	\$176

Recalculate using new 12/1/81 standards. These cases are overdue for recertification and should be recertified.

III. RESTORATION OF BENEFITS TO HOUSEHOLDS SENT COMPUTER GENERATED NOTICES WHO FILE A TIMELY APPEAL

Cases capable of being updated and adversely affected by the 12/1/81 program changes (FSP-902/Code A-130% or Code C-18%) were sent computer generated adverse action notices. The Temporary Restraining Order (TRO) issued in the Foggs v. Block Court suit found the original notices as transmitted by AP-81-45 to be insufficient. As a result, all households adversely affected were restored in December to their November benefit level.

Restoration of benefits for clients filing a timely appeal as a result of receipt of either of the computer generated notices (11/81 or 12/26/81) will be performed centrally. A temporary unit has been established to determine entitlement and provide benefits.

Recipients who returned the Appeal Card and whose cases would have automatically closed (Category 9 only) on either 10/31/81, 11/30/81 or 12/31/81 due to failure to timely recertify will *not* be restored to previous benefit levels. These households, whose certification period has ended are not entitled to benefit restoration and will be eliminated from this restoration process. Although these cases will not be restored to previous allotment levels, their appeal must still be heard. They will be scheduled for a fair hearing but will not receive an ATP from this Temporary Unit. These cases will be notified by the Temporary Unit that they will not be entitled to restoration of benefits.

Households that timely appeal the adverse action based on the 12/26/81 notice and were not scheduled for end of certification closure for the months of October, November or December, 1981 are entitled to and will be provided restoration of benefits. Terminated cases will be

issued an ATP for the full allotment level issued in November. Cases decreased will be issued an ATP for the difference between the November amount and the adjusted December amount. These amounts will be calculated from the allotment levels listed on the FSP-902 Report.

On 1/22/82, offices were sent photocopies of the Appeal Log established by the Temporary Unit. This log provides the names of cases which filed a timely appeal on either of the two notices (11/81 or 12/26/81) and are entitled to restoration of benefits beginning January 1982. If the timely appeal is not resolved (by decision, withdrawal, or abandonment) and the appellant's certification period has not ended, the Temporary Unit will again generate supplementary ATP's for the month of February, 1982. The amount of the benefits which will be issued will also be listed on the log. Instructions explaining entries will accompany the Log.

WC/jn

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AP-81-45

DATE: 11/19/81

TO: ASSISTANCE PAYMENTS STAFF

FROM: DUNCAN MACEachern, ASSISTANT COMMISSIONER,
FIELD OPERATIONS

RE: FOOD STAMP PROGRAM CHANGES — 12/1/81

INTRODUCTION

In August, 1981, legislation entitled the Omnibus Reconciliation Act required a number of changes in the Food Stamp Program which the Department will be implementing on 12/1/81. This memorandum provides a brief summary of each of the changes and describes the role of workers in implementing these changes.

POLICY CHANGES — GRADUAL IMPLEMENTATION

The following policy changes are effective on 12/1/81 for all new cases and must be applied to the current caseload at any time an issue arises regarding one of the policy elements, however, the policy must be applied no later than at time of the next recertification.

Household Definition — The Household Definition has been changed to require that living arrangements consisting of a child(ren) (no matter what age) and its natural/adoptive parent(s) must be considered as one household. The only exception to this rule is when at least one of the parents is 60 or over in which case the current rules for defining a household will apply.

Boarder Eligibility — The current policy defining who is considered a boarder and how to consider the income of a boarder has remained unchanged. However, once determined to be a boarder this individual is prohibited from receiving food stamps until his/her boarder status changes.

Strikers — Households containing a member who meets the food stamp definition of a striker are no longer eligible for food stamps unless the household was or would

have been eligible prior to the strike, i.e., counting the income of the striker(s) as it was prior to the strike. If the household was eligible they may receive food stamps, however, it will be at the level it would have been prior to the strike. Any additional income received, such as strike benefits, must also be considered in determining eligibility/benefit levels. This new policy regarding strikers does not apply to households in which the striking member is exempt from work registration for a reason other than full time employment.

If any of the above provisions are implemented within the certification period the notice requirements contained in the Food Stamp Manual - 364.840 and 364.860 are to be used. Otherwise the client must be notified by means of FSNL-1 or FSNL-2, which informs them of the result of the recertification.

The Department will be revising the FSP-1 (Food Stamp Application Form) and the FSP-5 (Change Report Form) to capture the additional information necessary to assist the worker in making appropriate eligibility determinations on the above policy changes. Until the revised forms are available workers must assure that during the interview the appropriate questions are asked to enable a correct eligibility decision, i.e. obtaining pertinent data on household composition, boarders and strikers.

The worksheet (FSP-4) has been revised to facilitate implementation of the gross/net income eligibility standard and the change in the earned income deduction which are discussed below. Eligibility and benefit determinations are to be calculated using the revised (12/81) worksheet for all actions effective 12/1/81 and after. An initial supply will be forwarded to local offices. Additional copies should be ordered in the usual manner from Printing and Supply at Kingston Street.

POLICY CHANGE — NEW APPLICATIONS EFFECTIVE 12/1/81

The following policy is to be applied to all Food Stamp applications with an application date of 12/1/81 or later.

Proration of First Month Benefits — Households applying on 12/1/81 or later who are determined to be eligible will only be entitled to benefits in the month of application for the period from the date of application through the end of the month.

FSPM XII explains the process to be used in calculating the amount of benefits the household is entitled to in the month of application and how these benefits are to be paid.

POLICY CHANGE — SYSTEM IMPLEMENTATION

The following changes are effective as of 12/1/81 and will be applied to all active cases as of that date. This effort will be system supported with local office responsibilities detailed below.

Gross Income Limit — As of 12/1/81, all households not containing an elderly/disabled member as defined in the Food Stamp Manual 364.400 (C) whose gross income exceeds 130% of the non-farm poverty income level (Maximum Gross Monthly Income Standards) will be ineligible for food stamps. Households containing an elderly/disabled member will still have their eligibility determined by comparing their net income with 100% of the non-farm poverty income level (Maximum Allowable Monthly Net Income Standards).

Earned Income Deduction — As of 12/1/81, the earned income disregard will be 18% of the gross earned income, after exclusions, rather than the 20% now allowed.

To accomplish these two changes (130% of gross and 18% earned income deduction) the computer will review each case to determine whether the case should be closed or reduced. This review will utilize the Recipient Master File as it appears at close of business on 11/20/81. The 130% gross standard will be applied to all cases except those cases identified as elderly/disabled by a medical expense code 1, 2, or 3 in B1. 39A of the TD. The 18% earned income deduction will be applied to all cases identified as having earned income in B1. 42 of TD.

Any closing/reduction will be reflected on the December ATP for those cases which the computer can identify and update.

A computer generated notice will be sent to each recipient whose case will be closed or reduced explaining the change in Federal regulations. The notice that is received will be specific to the reason for the change, i.e., 130% or Earned Income Deduction. Attachment #1 is the notice being sent to cases being closed as their income exceeds 130% of the gross limit. Attachment #2 is the notice being mailed to recipients whose cases are receiving an adjustment due to the new Earned Income Deduction. The address card enclosed with the notice has space for the client to request a hearing and instructs the client to return the card directly to the Division of Hearings. It is important that clients file an appeal by using the address card which was enclosed with their notice.

If a timely appeal is filed action will be taken centrally to restore the household to its previous benefit level. This system is being developed and detailed instructions will be issued shortly by a separate AP Memo.

A report (FSP-902 ATP Issuance Update Listing) will be printed and distributed for all cases that contain sufficient data for a computer review. A code will appear which identifies the specific action which was taken. (See ATTACHMENT #3 Reverse — Data Element #24) The listing contains the old and new food stamp allotment. Cases closed will show zeroes in the new food stamp allotment fields.

MANUAL UPDATE

A report (FSP-903 ATP Issuance Error/Action Listing) shall be sent to field offices during the week of 11/23/81 and will be issued by CAN. This listing identifies those cases which the computer was unable to adjust due to either missing information or information which did not allow a calculation. An error code will appear on the report which identifies the reason a household's benefits could not be reviewed and updated. An explanation of the error codes is given below.

EXPLANATION AND REQUIRED ACTION

ERROR CODE	EXPLANATION
2	Utility Code 4 appears in Block 47 and an amount greater than \$250 appears in Block 46. Check for accuracy of the utility code and amount.
3	Household exceeds maximum allowable net income standards or household size is greater than 18, Check for eligibility.
4	Medical Code 1 — Medical costs are zero or less than \$35.01 or Medical Code 3 — Medical costs are greater than \$35.00. These cases require manual calculation of the bonus value.
5	1) Recipient Master File data is incomplete. The bonus value cannot be calculated by the computer. Review and complete the latest TD using updated figures (code 5 only). 2) Case is under appeal. (A "7" appears in the appeal column.)
6	The computer calculated bonus amount does not equal the worker calculated bonus amount. Correct using updated figures.
7	Incomplete or incorrect information in block(s) 48 or 49, certification period. Correct using updated figures.
8	Invalid utility code/amount. Utility code does not agree with utility amount. Example: Case with utility code 2, Standard Utility Allowance, in block 47 with an amount other than the SUA in block 46.
9	Invalid Medical Deduction. Case is listed as a medical deduct code 1 or 3 but there is no one in the household age 60 or over or receiving Social Security Disability benefits.

Each case appearing on the FSP-903 must be reviewed to determine whether it is affected by either the 130% gross or

the 18% earned income deduction. If affected, a new calculation must be completed and the client notified. Clients affected by the gross income calculation must be sent two copies of the notice which appears as attachment #5 (#5A-Spanish). Clients affected by the change in earned income deduction must be sent two copies of the notice which appears as attachment #6 (#6A-Spanish). Since the number of cases on the FSP-903 should be limited, a supply of the notices appearing as attachments 5, 5A, 6 and 6A will *not* be produced by Kingston Street. Copies of these notices are to be made in the local office.

A Turnaround Document must then be completed to change the Recipient Master File for those cases adversely affected by either the 130% or 18% standard. When submitting the TD, a copy of the notice sent to the client must be attached. Normal appeal standards will apply to cases handled in this manner.

If no adverse action is appropriate, the worker must take the action required to correct the file data which prevented the automatic calculation.

If an adverse action is required for reasons other than the 130% or 18% standard, or for reasons in addition to the 130% or 18% standard the FSNL-5 process must be utilized.

All of the activity related to the cases appearing on the FSP-903 must be completed by 12/4/81. All changes in Household Eligibility or Benefit Level are to be in effect for January ATP's. A sample of the FSP-903 appears as attachment #4.

NEW AND REVISED MATERIAL FSP-4-Worksheet

AP-81-45

ATTACHMENT #3 (Reverse)

DESCRIPTION OF FSP-902 DATA ITEMS

Data Element Number	Data Element Title	Description of Data Element
1	FSP-902	Name of Report
2	REGION	Region Number
3	WSO	WSO/CSAO Number
4	SOC WORKER	Case Assignment Number of the worker whose cases appear on the list
5	DATE	This is the date the action took place
6	CAT	Category of the case being described
7	SSN	Case Social Security Number
8	NAME	Case Name
9	STREET	Street address of the case
10	RACE	Race code for case (block 22 of the T.D.)
11	HH	Number of people in the household (block 40 of the T.D.)
12	COUP OLD	Benefit level prior to calculation
13	COUP NEW	Benefit level resulting from new calculation
14	INCOME EARNED	Earned Income (block 42 of the T.D.)
15	INCOME UNEARN	Unearned Income (block 43 of the T.D.)
16	INCOME OASDI	OASDI Income (block 28 of the T.D.)
17	CHILD CARE	Amount of child care expenditure (block 44 of the T.D.)
18	SHELTER	Amount of Shelter Costs (block 45 of the T.D.)
19	UTILITY	Utility Costs (block 46 of the T.D.)
20	UT CODE	Utility code (block 47 of the T.D.)
21	CERT DATES BEGIN	First month of the certification period (block 48 of the T.D.)
22	CERT DATES END	Last month of the certification period (block 49 of the T.D.)
23	MED CD	Medical code (block 39A of the T.D.)
24	ERR CD	A. Designates case ineligible and therefore closed due to the 130% calculation. B. Designates the computer had all the information to do a calculation and there is no change in benefit level. C. Designates that the case was closed or decreased due to the 18% earned income deduction.
25	APL	Appeal Code (not applicable)

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AP/ADM-81-78

DATE: 11/19/81

TO: FIELD MANAGERS, CSAO/WSO DIRECTORS, ASSISTANT DIRECTORS FOR ASSISTANCE PAYMENTS, RDCU MANAGERS, FINANCIAL ASSISTANCE SUPERVISORS I AND II, FOOD STAMP SUPERVISORS

FROM: DUNCAN MACEachern, ASSISTANT COMMISSIONER FOR FIELD OPERATIONS

RE: 12/1/81 FOOD STAMP CHANGES

State Letter 559 and AP-81-45 transmitted the changes to the Food Stamp Program which become effective 12/1/81. This memo explains the administrative responsibilities related to the changes being handled by the computer.

In summary the computer will be reviewing each active Food Stamp case (PA and NPA) and making an automatic adjustment for the December ATP. Two copies of the FSP-902 report will be sent to each office. This report which is in REGION/WSO/CAN order identifies the cases which were adjusted because of the Gross Income limit and Earned Income deduction. One copy is to be retained as an office copy, the other is to be distributed to each worker for reference.

In addition an FSP-903 report will be produced which identifies those cases which the computer was not able to adjust due to either missing information or information which did not allow a calculation. Three copies of this report will be distributed. One report should be retained as an office control copy, one copy should be maintained by the Supervisor with the third copy being provided to the worker who is responsible for performing a case review and taking any necessary action resulting from the review.

At the conclusion of the effort a summary sheet (Attachment B) must be submitted to: Massachusetts Department of Public Welfare, Central Services, Office of Field Operations, 600 Washington Street, Boston, Mass. 02111, ATTN: 903 Reports.

CSAO Directors are responsible for collecting the reports for their respective WSO's. The WSO reports are *not* to be consolidated with the CSAO figures. CSAO and WSO figures are to be kept separate to facilitate accumulation of statistics at the end of the project.

Attachment A contains the timetable for completing the process.

Attachment B is the Reporting Form to be used.

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AP/ADM-81-79

DATE: DECEMBER 1, 1981

TO: FIELD MANAGERS, CSAO/WSO DIRECTORS, RCDU
MANAGERS, ASSISTANT DIRECTORS FOR ASSISTANCE
PAYMENTS, FINANCIAL ASSISTANCE SUPERVISORS I AND
II

FROM: DUNCAN MACEachern, ASSISTANT COMMISSIONER FOR
FIELD OPERATIONS

RE: 12/1/81 FOOD STAMP PROGRAM CHANGES — UPDATE

This memorandum provides an update on the computer effort related to the 12/1/81 Food Stamp changes as communicated by SL 559, AP-81-45 and AP/ADM-81-78.

In summary there was a slight delay in the programming of the 12/1/81 changes which has resulted in a delay in the receipt of the FSP-902 and FSP-903 reports. These reports will be received on either 11/30 or 12/1. As a result of this delay the timetable which appeared as Attachment A to AP/ADM-81-78 has been revised. Attached is the new timetable.

In addition to the delay there were a few other modifications to these reports which are outlined below:

- Each worker will receive three (3) separate 902 reports. There will be a separate report for each of the three error codes.

Error Code A — Cases which were terminated as a result of the 130% calculation.

Error Code B — Cases which were unchanged as a result of the new program changes.

Error Code C — Cases closed/reduced as a result of the change in the Earned Income Deduction.

- AP-81-45 explained what would appear on the FSP-902 under the heading "Old Coup" and "New Coup". Due to

a programming change these instructions do not apply to those cases which are closed. The values that appear under these headings are not to be considered for closed cases.

- There is a separate 903 Report for each Error Code. Therefore workers could receive multiple 903 Reports.
- An "R" will appear on the printout under the column headed "APL". Any case with such a code has been calculated using the new rounding computation which became effective on 9/1/81.

Please see that appropriate staff are notified of the changes.

DEPOSITION OF JOHN F. CASSEDY

* * *

[4] *Direct Examination*

* * *

Q. Can you state your name and address and occupation?
 A. John Francis Cassedy, C-A-S-S-E-D-Y. 183 High Street, Hingham. I am director of systems for the Department of Public Welfare.

Q. How long have you been working with the Department of Public Welfare? [5] A. Sixteen years.

Q. And how long have you been the director of systems there? A. Since October, 1980.

* * *

[6] Q. What is your educational background? A. I have a Master's Degree in Social Science from Simmons College in Boston.

Q. And do you have any educational training in computer science? A. Could you explain what you mean by that?

Q. Well, did you take courses in college in computer science? A. I took courses at graduate school, and I took in-service training in courses offered by a variety of producers of computer systems.

Q. Okay. What's the organizational structure of the Department of Public Welfare? A. There is a commissioner.

Q. And who is below the commissioner? A. There is a deputy commissioner.

Q. There is just one deputy commissioner? A. Yes.

Q. Who is below the deputy commissioner? A. An associate commissioner.

[7] Q. Who's below the associate commissioner? A. There are a number of assistant commissioners and directors.

Q. And how many assistant commissioners and directors are there? Do you know? Can you run down the different branches, or bureaus? A. There's a director of medicaid. There's a director of policy and procedure — I'm sorry.

There's a director of policy, a director of procedure, a director of hearings. There's general counsel, director of child support enforcement, assistant commissioners for administration. And there's an assistant commissioner for field operations.

Q. Okay. And where do you fit into that picture? A. I report directly to the associate commissioner.

Q. Which associate commissioner? A. James M. Hall.

Q. And what organizational level is your bureau in? A. I have one assistant director.

Q. And who's that? A. Rita Leweck.

Q. And below the assistant director? A. There are four project managers.

Q. And what projects do they manage? [8] A. One is responsible for the development of model child support system. One is responsible for the implementation of the FAMIS project. One is responsible for the day-to-day activity in the Department. And one is responsible for the coordination of our on line data entry.

Q. And who is the person responsible for coordination of the on line data entry? A. Robert Falk.

Q. What is the FAMIS program? A. Family Assistance Management Information System. It's a federally-mandated — it's a guideline produced by the Health and Human Services to assist the states in developing automated management systems meeting minimum Federal criteria similar to MMIS.

Q. What is that? A. Medicaid Management Information Systems.

Q. That would be the responsibility of the assistant commissioner of medicaid or director of medicaid? A. Yes.

Q. And below the project managers, who would there be in your bureau? A. There's only two additional staff people who work at [9] 600 Washington Street — I'm sorry. There's one I'd like to go back and correct. The monthly income reporting is responsible to me.

Q. Who is in charge of that? A. Jim Gleich.

Q. And below the project managers? A. There's two staff.

Q. Do they work with any particular one of these five subdivisions? A. For the most part they work with Rita Leweck in terms of day-to-day systems, analysis systems planning.

Q. Does your bureau have responsibility for the issuance of A.F.D.C. checks and food stamp ATP's? A. We have the responsibility for maintaining the system that does issue benefits.

. . .

Q. Does your bureau have any responsibility for [10] overseeing the computer system that generates the monthly food stamp ATP's and the A.F.D.C. checks? A. Can you define "oversee"?

Q. To insure that the data is being collected and fed into the computer correctly, that the computer programs themselves are correct so as to generate checks and ATP's in the proper amount? A. Yes.

Q. Does the Department of Public Welfare's computer system presently have the capability for generating any notices of reduction or termination of public assistance benefits? And when I refer to the Department's computer system, well, why don't I strike that and lay a better foundation. A. We do not have a Department of Public Welfare computer system.

Q. Are the Department of Public Welfare benefit checks issued by computer? A. Yes, they are.

Q. And who owns that computer? A. The computer resides under the supervision of the secretary of administration and finance.

Q. Do you know if it is owned by the State or leased? A. I believe it is leased.

[11] Q. Do you know what type of machine that is? Make and model number? A. I know the product name is IBM.

Q. But you don't know the model number? A. Well, I know the main frame model number is a 3033.

Q. Okay. Then there are certain notices of reduction or termination of public assistance benefits generated by computer? A. No.

Q. In the MIRS system are there computer generated notices of reduction or termination of benefits? A. Yes.

Q. How long have you been working with the computer system that generates the A.F.D.C. checks and food stamp ATP's? A. Off and on five years.

Q. And how long have you been working with the MIRS computer system? A. Approximately 18 months.

Q. And how old is the MIRS computer system? A. 'I don't understand what you want to assign age to.

Q. How long has the Department of Public Welfare been involved in the monthly income reporting system, computer operated monthly reporting system? [12] A. The Department signed a contract approximately 24 months ago to develop a monthly income reporting system.

Q. And when did that go on line? A. July 1st, 1981.

Q. And you became involved in that project, the MIRS project, approximately 18 months ago? A. Yes.

Q. Did you have any involvement in designing the MIRS system or in designing the computer system which generates the checks or ATP's? A. What do you mean by "design"?

Q. Well, developing the computer programs? A. No.

Q. Did you have any involvement in determining what types of reports and what types of notices, end product notices you wanted to generate by that — by the MIRS system? A. A very cursory review.

Q. Is there a contract which the Department entered into with the Electronic Data Processing Corporation? A. Yes, there are two contracts.

Q. With regard to the contracts — with regard to the computer which generates the A.F.D.C. checks and [13] food stamp ATP's, does it perform any other function for the Department in addition to generating those checks and ATP's? A. Such as?

Q. Such as does it generate the general relief checks? A. Yes, it does.

Q. Does it report, print out and report data to the Department concerning any characteristics of those? A. Yes, it does all of the report writing, yes.

Q. What kind of reports does it issue? A. It provides a series of management reports.

* * *

Q. With regard to the Food Stamp Program, does it generate management reports? A. Yes, it does.

Q. And can you describe — can you name — are there different management reports that it generates? A. Yes, there are.

Q. Can you tell me what those different management reports are? [14] A. I can recall some of them, yes.

Q. Okay. To the best of your recollection. A. There is a 902 report.

Q. What does that do? A. It indicates the participation of individuals in the Food Stamp Program. And the amount of benefits that they receive on a monthly basis.

Q. Okay. Are there other reports? A. There's a 903 report which provides those situations where there are errors in the processing of data that requires field follow-up and correction.

Q. Are there others? What kind of errors does it report? A. There's a requirement that certain income fields come in with pennies and other fields come in with the pennies dropped off. If in fact it is processing data inconsistent it will error that process off for the worker to determine what is the correct amount of money that should be in that field.

Q. Okay. What other reports does it generate? A. It generates a duplicate issuance report.

Q. And what is that? A. It indicates that the same person has received benefits in more than one category of assistance.

[15] Q. Are there any others? A. A reconciliation report which compares the machine issuance authorizations to purchase with the over-the-counter authorization to purchase.

Q. Are there any other reports? A. There's a timely case closing report.

Q. And what does that do? A. FNSL 12.

Q. What is that? A. That determines those households in which the certification period is going to end in the next month, and it automatically notifies those households that they are obliged to communicate with the Department regarding their continued recertification for food stamps.

Q. How does it notify the household? A. It goes into the master files, it selects those cases — for illustration in the first of February it will select those households due for a closing at the end of March. It will generate a list. It will send out an IBM stock card to those households indicating that their participation in food stamps will end in the next subsequent month and they are obligated to notify the Department and to enter into [16] a recertification process.

Q. The IBM stock card is a preprinted notice? A. Correct.

Q. A general notice? A. Correct.

Q. And the computer generates an address list, essentially? A. A name and address card that goes with the notice.

Q. Does it also generate an envelope? A. We use a window envelope in which to insert the name and address card.

Q. Are there any other reports? A. There are master files by social worker or financial assistance and food stamp worker. There's reports of cases, summation of cases by regions, the WSO's, CSA's. It reports the sum of the amount of money and the number of participants in the state.

Q. Is there anything else that you can think of? A. Not that I can think of.

Q. Is your — you're responsible for modifying the programs which generate the checks and the ATP's if there is a change in law necessitating a change in computation formula? A. We are responsible to working with policy and/or [17] procedure to do a systems request to modify, if in fact it is a data

processing system necessary to meet the changes in regulations or changes in circumstances.

Q. Okay. Who actually does the modifications? A. The Bureau of Systems Operations.

Q. And that's in the Department, Massachusetts Department of Administration and Finance? A. Finance, yes.

Q. How often have those programs had to be modified in the last six months?

Ms. JANOS: Can you be specific as to which programs you're talking about?

Q. Okay. The program which generates the food stamp ATP's, to be specific. A. Four times in the last six months.

Q. And what changes had to be made in those programs? A. One was—the first one was to account for the ratable reduction.

Q. When was that done? A. That was done in August. The second one was what we call rounding.

Q. And what is rounding? Q. Rounding is the phenomenon that I described previously [18] where certain fields, earned income, child care, which demand there be cents in the cents field, and other situations required that it come in rounded. The Federal government requires that these monies be in a predictable fashion so we had to change our system to meet their regulations.

Q. So that would just be either the rounding would be reducing a number that included cents to one that just included dollars, something like that? A. Correct.

Q. Okay. What was the third change? A. We had to change the programs to do 130 percent calculation. For those households who were working we had to modify the program to be able to determine the number of households in which the income they had reported to us exceeded the allowable tables provided by the Federal government, Department of Agriculture to us. We call it the 130 percent test.

. . .

Q. How much effort in terms of man-hours of work or woman-hours of work was required to—

[19] THE WITNESS: Which change are you speaking to?

Q. The 130 percent change. A. I could only give you a very general estimate. BSO could give you a much more definitive statement in terms of man-hours, man-weeks, to make the necessary changes. I would just say that it was with a great deal of difficulty.

Q. Did you initiate requests to BSO? A. The associate commissioner James Hall requested me to proceed with systems modifications to account for the food stamp changes.

Q. That would be the 130 percent? A. Yes.

Q. Were there other changes as well? A. There was also a request to institute the 18 percent multiplication factor on households that had reported to us that they were working.

Q. Is that what is also referred to as the 18 percent earned income disregard? A. Yes.

Q. Were those in both the 130 percent and the 18 percent changes required modification of the computer programs that generate ATP's? [20] A. Yes.

Q. And was a request made to BSO by the Department of Public Welfare to modify the computer programs to accomplish those changes? A. Yes.

Q. And when was that request made to BSO?

Ms. JANOS: Which one are you talking about?

Q. Well, was there one request or two requests? A. There was one request.

Q. For the change to 130 percent and to 18 percent? A. Yes.

Q. And when was that request made? A. We advised BSO, I believe, in August of the then presumed change in Federal regulations anticipating the actual signing into law of these changes. The formula request did not take place until the first or second week in October.

Q. Did anyone at BSO ever discuss with you the length of time or the number of man-hours or man-weeks that would be required to accomplish this change? A. Yes.

Q. And what did they tell you? Q. They told me that it was a difficult task, and that [21] the person most responsible for the maintenance and changes was seriously ill with cancer.

Q. And what was the name of that person? Q. Joseph Cardello.

Q. Did they give you an idea as to how long it would take to effectuate the modification of the programs? A. We indicated that there was a date in which it must be done.

Q. And what date was that? A. December 1st, 1981.

Q. And why did it have to be done by that date? A. That was the date to which I believe the Department of Agriculture waived the ten/one implementation for the State of Massachusetts.

Q. By ten/one, you mean October 1st? A. October 1st, yes.

Q. And what date did you tell them—you had told them it had to be done ten/one. When you told them that, what was their response? A. That it would be very close, and in light of this individual's illness, that it was at best a 50/50 proposition.

Q. Was the change accomplished by December 1st? A. Yes, it was.

[22] Q. And when were you notified that a change had been effectuated? A. By whom?

Q. When did BSO inform you or the Department of Public Welfare that they had in fact modified the computer programs to accomplish this change? A. Wednesday before Thanksgiving at 4:00 o'clock when in my judgment we were ready to proceed with the implementation of the system.

Q. Is that when they notified you? A. I was present when we were reviewing the test output at that point.

Q. And what decision was made on that Wednesday at 4:00

o'clock? A. That the programs work successfully, and that as a responsible agent on behalf of the Department of Public Welfare I authorized their cataloguing.

Q. What is cataloguing? A. Taking them from a test environment and putting them into production.

Q. How long does that take? A. Cataloguing programs all depends. An hour, an hour and a half.

...

[23] Q. Was a general notice sent out to all food stamp households affected by the 130 percent change and the 18 percent change? A. What do you mean by "general"?

Q. A notice which was the same with regard to each household. It didn't have any individual information on it with regard to that household's specifics. A. There were different messages sent out.

Q. Okay. Was one—did one relate to the hundred thirty percent persons affected? A. Yes.

Q. And one to households affected by the 18 percent change? [24] A. Yes.

Q. And when did the Department make the decision to send out the notices to those households affected by the 18 percent change? A. I do not know specifically.

Q. Do you know when those notices were sent out? A. Do I know when they were mailed out?

Q. Yes. A. They were mailed out on the—there were two different classes of notices. A hundred thirty percent were mailed out on November 25th. And the 18 percent were mailed out on November 30th.

Q. How did the Department determine which households would be affected by the 18 percent change? A. I don't understand.

Q. Well, you mailed a notice out to all the households affected by the 18 percent change. How did you know which households were affected by that change? Did the computer generate a list or mailing slips, or did the Department person-

nel determine this by hand? A. The computer determined those households in which the change from 20 to 18 percent would apply.

Q. And did it then print up a mailing slip or an address slip? [25] A. It printed up a name and address card to be inserted with the accompanying message.

Q. I'd just like to show you this and ask you if that is an example of one of the computer generated name and address cards? A. Yes, it is. . . .

Q. And did this name and address card serve any other function? . . .

THE WITNESS: I believe this message on [26] the bottom was to be able to be completed if the household wished to appeal. I believe there was a second purpose for that.

Q. Do you know what computer language the BSO computer uses or operates on? A. I can respond that the proper person is BSO, at BSO. My assumption is it is in Cobalt.

Q. Do you know the memory size of the machine that they use? A. No, I don't.

Q. Do you know what media the data is stored on? A. Once again, I can indicate to you to my best knowledge the proper party would be BSO who's responsible for the maintaining of the data. My understanding is it is on tape and disc.

Q. Do you know what kind of peripherals the BSO has? A. I know they have disc drives and tape drives and printers. But I don't know explicit details in terms of the types and capacities.

Q. Are there terminals also? A. What do you mean? I don't understand.

Q. Are there terminals for the input of data into the BSO computer? A. Yes, there is.

[27] Q. What time sharing arrangements does the Department of Public Welfare have with the Bureau of

Systems Operation for the use of the computer? A. Once again, I think the best party to speak to that would be BSO, but my understanding in working with them is we have the number one priority with BSO.

Q. Are there any contracts or written agreements or arrangements concerning the Department of Public Welfare's access to and use of computer time? A. I believe there is a very general interagency agreement that was developed in April or May speaking to service obligations that BSO would have to the Department of Public Welfare.

Q. Do you have a copy of that agreement in your files? A. I could find a copy, yes. . . .

Q. Does the Department have access to the computer to make an emergency or short notice runs, or ad hoc information requests? A. We—the Department has the right to request. Once again, programming and the actual retrieval of information is the obligation and responsibility of [28] BSO. We do have instances where we do request information in what you might call an ad hoc or as needed basis.

Q. Has BSO ever turned down the Department on one of these requests, to your knowledge? A. No.

Q. How many programs are there, do you know, for using the BSO computer to generate food stamp ATP's? A. I really don't know. There's a series of programs, that's all I know.

Q. Who developed the programs? A. Back in 1974 they were developed by the project management office which subsequently became BSO.

Q. In what department was the project management office? A. The Department of Public Welfare.

Q. Were you 'n that project management office involved in that at the time? A. No, I was not.

Q. And how long has the Department been using these programs? A. Since 1974.

Q. Do you know how often food stamp computer programs

have been modified over that period of time? Q. Only in general terms.

[29] Q. In general terms, how often? A. I would say probably—I would say there's been over 25, as many as 35 changes to the basic system.

Q. And who did the modifications? A. PMO, BSO.

Q. Depending on which agency was operating the system at the time? A. Correct.

Q. And what types of modifications were done? A. Well, I can give you two examples. When food stamps initially was part of—became part of the Department of Massachusetts we were on commodity distribution. And ATP was two-sided. A person could redeem the first part in the first part of the month, and the other half in the other half of the month. Then they required we send out one ATP for the entire month.

The second was we used to have an authorization to purchase for a hundred dollars of which the recipient was obligated to pay thirty dollars of that toward the one hundred dollars in food stamps. I don't remember the exact day, but the Department of Agriculture changed that requirement. There was no cash requirement. The ATP redeemed that on presentation.

[30] Q. And any time the law changed so as to change the formula for computer food stamp benefits, the program would have to be modified? A. Yes.

Q. What kind of computer readable data is available from the BSO computer regarding each food stamp household? A. I really don't know what you mean.

Q. Okay. Computer readable data would be data in the form of card files or tape files, disc files or marked sense forms, or there are other ways in which— A. Could you repeat the question?

Q. What computer readable data is available regarding each food stamp household from the BSO computer? A. I think that BSO would probably most assure a correct answer, but I do know we store our media on disc and tape.

Q. And would those discs and/or tapes contain the income data on food stamp households? A. Yes.

Q. Would it contain data on the housing costs of a food stamp household? A. Yes.

[31] Q. Would it contain data on all the elements that go into the computation of a food stamp ATP? A. Now, what do you mean by "computation"?

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Q. Well, what data does the computer have in it, or on tape, which enables it to determine food stamp benefits amounts? A. It carries the adjusted income for each household, earned income. It carries the summed unearned income. It contains the household composition, includes medical deductions, child care costs, shelter and utilities. . . .

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[32] . . . I think that covers the variables.

Q. And would all of these variables be contained on a stored tape, be stored on tape, or disc? A. Yes.

Q. How is that information collected? A. It's collected via an assortment of applications, reapplications. Data gathering forms essentially by technicians, case workers, and to some extent clerks. Any agent on behalf of the Department can collect data.

Q. That information is collected at the local office level? A. Yes, it is.

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Q. After it's collected at the local Welfare Office, what is done with it? A. The data is transcribed onto a turnaround document. That's the only acceptable input document into our data processing system. And it's prepared by a technician or case worker. It's then submitted to an edit and preparation clerk who edits the document for legibility, any kind of obvious errors, batches [33] the data and prepares it for pick-up by the courier.

The courier generally goes by every office in the state on a

daily basis and picks up such bundles of data that is already batched.

Q. And what does the courier do with batched data?

A. The courier then takes it into our regional data control units. I would call them R.D.C.U., if we continue. The acronym is R.D.C.U. The R.D.C.U. receives the data. They once again edit it for legibility, do a higher level of editing in terms of interfield relationships, alpha/numeric, and get it ready for key entry at the R.D.U. which is the key entry unit. It's physically contained in the R.D.C.U.

Q. And then what happens next? A. The batches are key entered. They are passed on line to a disc that resides at 801 Ashburton Place. Whatever is received that day is processed that day, generally. The system does an update that evening, accepts data or rejects the data.

Q. What would cause the computer to reject the data?

A. If in fact the worker's conclusion, the worker when arithmetically computing the amount of food stamps that a participant is entitled to, the master computer [34] calculation system does not agree, it will reject the incoming data and put out an error message to the worker.

Q. When the worker collects the data and fills out the turnaround document, included on the turnaround document is the correction that the worker enters, the earned income, summed unearned income, household composition, medical expense, shelter, utilities, child care as well as a determination or computation as to the benefit amounts as well? A. Yes, correct.

Q. Does the computer generate a report which is sent back to the local office for a verification of accuracy? A. Yes, it does.

Q. And in what form is that report? A. The report is called the 1070. It is printed back at the R.D.C.U.'s reflecting the previous day's input into the system. It's reporting by exception. It only contains those situations in which there was a

check or benefits issued, and/or there was an error. If in fact a worker requested an address change, if that successfully passed the edits, only if there is a check or benefits produced and/or if [35] there's an error is it returned on a 1070 report.

Q. If a turnaround document were entered to change a benefit in a subsequent month, but not require issuance of an ATP immediately, would there be a report which came back to the R.D.C.U. on that, assuming that the computer found no error? A. I'm sorry. I don't understand the "subsequent month".

Q. Okay. Let me take a hypothetical. On January 5th a recipient reports to a social worker a change in an income. And the social worker takes down that change in income, fills out the turnaround document for submission to the computer to change that recipient's food stamp benefits for the month of February to reflect the change in their earned income. Assuming that the computations by the case worker match the computations that the computer does with the new data would a report on—a report 1070 be printed out? A. No. For every transaction that's posted to the master file, the worker gets a new turnaround document.

Q. And that turnaround document is issued by the computer? [36] A. Yes.

Q. And what does it have? What does it include? A. It's a representation of the master file, recipient master file and a portion of the history file as of that update.

Q. Is it printed out in the same format that is the turnaround document that the worker has sent in? A. Yes.

Q. Is the worker required to do anything with that turnaround document when it comes back to the worker? A. They are procedurally required to review the returning turnaround document to compare it with a copy of the originating turnaround document to be sure that the changes that were noted upon it, or requested by a social worker on behalf of an applicant recipient were in fact accomplished on the data files.

Q. Is the case worker required to send in any documentation that this check has been completed? A. No, there is not.

Q. Only if they discover an error? A. Correct, yes.

* * *

[37] Q. Does the computer that generates the ATP's have data information on the entire food stamp population in Massachusetts? A. What are you referring to?

Q. The BSO computer that generates the ATP's for the entire food stamp population in Massachusetts. A. Yes. On tape or disc it has data on the entire food stamp population in Massachusetts, the data that we outlined just before, yes.

Q. Okay. How long do you keep that data? A. Once again, I'd have to defer to BSO. There is a predetermined retention schedule that meets all Federal and State requirements, but the exact retention, BSO would be able to speak to that.

Q. Do you know if it's more than a year? A. I believe so, yes.

Q. Can you obtain from the computer information on the amount of food stamp benefits a household received in [38] a prior month? A. Yes.

Q. Could you find out the amount of food stamp benefits a household received six months prior? A. Yes, I could.

Q. And that can be done with the existing program? A. Yes.

Q. Is the computer presently capable of reporting the amount of a reduction in benefits attributable to any given change which occurred in a food stamp household's benefit level? A. Would you repeat that, please?

Q. Is the computer presently capable of reporting the amount of a reduction in food stamp benefits attributable to a given notice, a given notice or a given change that occurred, for example, in December if a household's food stamp benefits were reduced ten dollars because of a change in income, would it be possible to retrieve that information from the com-

puter? A. Are you—are you trying to determine if it is possible or if today anything is possible?

Q. No, if today you can do it.

* * *

[39] THE WITNESS: Are you speaking to mass changes or any change that occurs during the month for any recipient?

Q. At this point I'd be talking about any change. A. No.

Q. Okay. Are you able to—are you presently capable of obtaining from the computer system, the present computer system, the amount of reduction which a given household received due to the change from 20 percent to 18 percent in the earned income disregard? A. Yes.

Q. And were you able to obtain that information in December of 1981? A. In what medium are you suggesting?

Q. Well, in a general report. A. Yes.

Q. In late December or December of 1981, or early January, 1982, a series of supplemental food stamp ATP's were issued to all households which were— [40] which received a reduction due to the change from 20 percent to 18 percent in the earned income disregard. Were those ATP's computer generated? A. Yes, they were.

Q. Did computer programs have to be modified to accomplish the issuance of that supplemental ATP? A. My understanding is that we reran the tapes that resulted in the first change. I believe there was some slight modification. Once again, I think BSO would have to speak to the degree of complexity in rerunning the supplemental ATP's to those affected individuals.

Q. Okay. So your answer is that you're not certain exactly what was done to accomplish that? A. Yes.

Q. About when did the Department of Public Welfare notify the Bureau of Systems Operations that those supplemental ATP's needed to be generated? A. I really don't know the exact day. It was immediately after Judge Freedman's decision in Springfield. It was very shortly thereafter.

Q. Did the Bureau of Systems Operations inform you of how much time would be required to accomplish that task?

A. Yes, they did.

[41] Q. And how much time did they say would be required to accomplish that task? A. They did not specify in terms of man-days or man-weeks. They indicated that because of the coming Christmas holidays and as a result of other tasks that it would be a difficult situation to in fact send out supplementary ATP's within the time specified by the Court.

Q. Do you know when the ATP's were printed by the computer? A. The ATP's, I believe, were printed around the 29th of December using January ATP stock.

Q. Do you know how many people in the Bureau of Systems Operations worked on the generation of the supplemental ATP's? A. The total number of people?

Q. Yes. A. I could only guess that maybe as many as ten people were involved in one way or another. BSO would know.

Q. And what exactly did the supplemental ATP reflect? A. It reflected the difference between what they would have received if in fact the 18 percent calculation had not taken place. It represented the difference between November and the December ATP.

. . .

[42] Q. Okay. Before the ATP's for December 1981, before the original ATP's for December 1981 were issued, could the computer have determined and reported the actual amount of the reductions that were going to go into effect that month, the dollar amount? A. Who would you want that reported to?

Q. Could the computer generate a general report, a print-out or whatever of that information? A. The difference between the preceding month and the new month?

Q. Yes. A. Yes.

Q. Did it do that? A. Did it—did we—okay, ask the question again.

Q. Did the computer print out a master list by household of the reductions that went into effect in December? A. You mean the specific difference?

[43] Q. Well, either the earlier amount, the former amount and the reduced amount or the actual difference, whichever? A. Yes.

Q. And was it a former and present amount, or was it the dollar amount of the difference that it reported? A. It reported the level of participation for November and the level of participation as a result of the change in December.

Q. And when was that report issued by the computer? A. I have a copy of the report dated 11/25/1981.

Q. Okay. Could the computer print out an amount on a notice individually addressed to each food stamp household? Could it have done it as programmed back in December?

Ms. JANOS: Could you state specifically what is it that you—

Q. Print the amount of the reduction attributable to the 18 percent change on a notice individually addressed to each food stamp household? A. Would you read the question again?

Q. Could the computer in November or early December, 1981, as it was then programmed, generate a notice individually addressed to each food stamp household [44] informing that household of the actual amount of the reduction due to the 18 percent change, or informing them of the prior benefit level and the new benefit level due to that change? A. At that point in time the program was not able to do that.

Q. Is it capable of doing that now? A. I would think that that would be best answered by BSO.

Q. Well, do you know whether it could do that now? A. It would have to be an assumption on my part. I do believe with some effort it could possibly be done.

Q. Now, when you refer to some effort, would that refer to some modifications in the program? A. Yes.

Q. Do you know how long it would take to accomplish those modifications? A. No, I don't.

Q. The supplemental ATP's that were issued, are they individually addressed to specific persons or households? A. Yes.

Q. Does that appear right on the ATP, the name and [45] address of the household? A. Yes, it does.

Q. Does that ATP also have printed on it that household's specific food stamp benefit allotment? A. Yes, it does.

Q. On the supplemental ATP's, printed on them was the dollar amount of the reduction due to implementation of the 18 percent change; is that correct? A. Say that again?

Q. The supplemental ATP's, the dollar amount that was printed on the supplemental ATP's was the amount by which those families' food stamp benefits were reduced in December due to the 18 percent change; is that correct? A. Are you suggesting that the card was given different—

Q. No, I just want to know the amount of it. A. It reflected the amount of the difference between November and December.

Q. And that difference was due to the change from 20 percent to 18 percent in the earned income disregard? A. Correct.

Q. Okay. If you can produce by computer and send to the right address individual supplemental ATP's [46] representing the amount of the food stamp reduction due to the change from 20 percent to 18 percent in the earned income disregard, what would have to be done to produce by computer and send to the right address individual food stamp notices informing the households of the amount of the reduction due to the change in the earned income disregard, if you know? What would have to be done? A. I couldn't speak to all of the modifications that would be necessary. I think BSO would have to speak to the modifications in the processing and particularly the printing of the data.

Q. Okay. Can information stored in BSO computer be transferred to the MIRS computer, if you know? A. I don't know. I really couldn't answer. It's too vague.

Q. Okay. Does the BSO computer have the capacity to generate a mag tape which the MIRS computer could accept and process and input a mag tape containing data on food stamp households? A. I think that would be properly answered by BSO.

Q. Is your answer that you don't know? A. Yes.

Q. Okay. If you don't know, please say "I don't know." [47] Don't say "It would be properly answered by BSO." A. Okay.

Q. Is information from the data from the MIRS computer transferred by magnetic tape to the BSO computer at present? A. Yes.

Q. Does the data that's transferred include data on food stamp households that are included in the MIRS reporting system? A. It includes food stamp data as it relates only to the A.F.D.C. cases that are on the MIRS system.

Q. Does the BSO computer also get data regarding food stamp changes for those A.F.D.C. households with earned income from the local case workers through the turnaround document process that you described before? A. Could you clarify that again?

Q. Okay. Before we went through the process by which information is fed into the BSO computer by use of a turnaround document. A. Yes.

Q. That is also fed into the MIRS computer. And we went through in some detail this morning how that was done. [48] A. Yes.

Q. And data is also transferred from the MIRS computer to the BSO computer by a magnetic tape. Now, any food stamp household with earned income that also receives A.F.D.C. would also be in the MIRS computer. And for such a household are changes, also a change in food stamp benefit

amount because of, say, a change in rent, would that be generated through a turnaround document from the social worker, or would that be generated only by first going through the MIRS computer? A. Once a case is what we call initialized on the MIRS system, all subsequent changes to any data must pass through the MIRS system.

Q. Is there some procedure to check whether or not any given household is on both systems? A. They have to be on both systems. They must be carried on both master files. BSO produces the benefits as a result of transaction input from EDS. So because of the fact that BSO is the repository of the benefit issuance, they have to appear on both files.

Q. Does the data that's transferred from MIRS into the BSO computer, is that in the same format as the [49] turnaround document? In other words, it would be earned income summed and the earned income adjusted? A. It is processed data that MIRS passes to the BSO computer system.

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Q. When a new recipient is added to the MIRS system because of a change in their statutes so that they're subject to the monthly income reporting system, how is the base data on that individual determined? Is that taken from the BSO computer, or is it generated by the case worker? A. Upon an indication that the recipient, A.F.D.C. recipient is working and is thereby subject to the EDS calculation system, a worker sends corresponding documents into 600 Washington Street, whereupon a card is produced. That goes into the BSO recipient's [50] records, produces an output tape which is then fed into EDS. And that is how they initialize the case in their file.

Q. You say it generates—the BSO computer generates an output tape that's initialized into EDS? A. Camp Hill, yes.

Q. And is that a magnetic tape? A. I believe so, yes.

Q. And when the MIRS system began was output tape generated with regard to the entire initial population that

formed the monthly income reporting system? A. The first pilot office, Roxbury Crossing, the entire recipient independent file was selected, produced on tape and loaded at Camp Hill and EDS.

Q. Do you know how many food stamp households received a reduction in benefits in December due to the 18 percent change in the earned income disregard? A. Yes, I do.

Q. And how many? A. I'm sorry. Do you mean received the notice or actually received a decrease?

Q. How many households actually received a reduction? A. About 16,640.

[51] Q. And how many households received a notice? A. All.

Q. And how many was that? A. Sixteen thousand, six hundred and forty.

Q. Okay. So the same number of households that received a notice received a reduction? A. Yes.

Q. Do you know how many of these 16,640 households are in the monthly income reporting system? A. I don't. I can't answer that specifically, but the general rule of thumb is about one-half. The population of cases that are on the MIRS system, the rate of participation in food stamps is a little less than 50 percent. There's approximately 26,000 cases, therefore there was 13,000 of the potential 160,000 that was subjected to this recalculation. I would guess there may have been as many as 3,000 that would have received notice such as this. It's just a mathematical guess on my part.

Q. Okay. The rule of thumb is slightly less than 50 percent of what population? A. Of the cases that are on the MIRS system. Slightly less than 50 percent could participate in food stamps.

[52] Q. So approximately, and earlier this morning there was testimony that there were approximately 26,000 households in the MIRS computer, approximately 13,000, give or take a few, receive food stamps? Isn't it true that every

household that receives food stamps in the MIRS system would have been subject to this 18 percent change? A. Yes.

Q. Okay. So approximately—I see approximately 13,000 of this 16,640 were in MIRS, and the 3,000 figure was the number that weren't in MIRS? A. No, that's wrong. Why don't we start over again.

We have 26,000 cases on MIRS of which approximately one-half of them participated in food stamps. So approximately 13,000 households of the 176,000 households, that's our whole universe.

Q. Every one of those 13,000 houses in the MIRS system that receives food stamps was subject to the 18 percent change because every one of those receives earned income? A. They were subject to, but not included because the tolerance after the application of the 18 percent resulted in sometimes within the table, resulted for some people in no change.

[53] If you're interested, we had 176,000 subject to the recalculation. Of that, approximately 10 percent had a change, which means that 90 percent after the recalculation had no change.

Q. Now, I understand and I appreciate your clarification. In an average month, how many individual notices of change in benefits with respect to the food stamp program does the Department of Public Welfare send out, if you know? A. I would say — this includes notifications generated by workers?

Q. By workers also. A. I couldn't even guess.

A. In October and November of 1981, was there a backlog or bottleneck at any point in the information collection and entry system regarding A.F.D.C. and/or food stamp benefits?

A. To the best of my knowledge there was no backlog in the processing of data by the Department to BSO. There was during the month of October a backlog of cases and data related to these households that were in the earned income configuration on MIRS.

Q. And what caused that backlog? A. It was in essen-

tially the start-up of the—well— [54] the MIRS system was designed and built to be a pilot for three offices with a maximum of 13,000 A.F.D.C. cases. And we doubled, approximately, the file size and the transaction load. And we encountered significant growth problems by doing that.

Q. And how long did it take to reduce that backlog? Q. I can't say exactly. I would say it took four weeks to deal with that backlog.

Q. Do you know who drafted the first notice that went out in late November, 1981, informing food stamp recipients of the 18 percent change?

. . .

THE WITNESS: I don't know.

Q. (By Mr. Rae) Do you know how many monthly report forms the DPW sends out in the monthly income reporting? Q. All of Roxbury Crossing is on it. That's approximately [55] forty-seven hundred cases. Half of Adams Street which is approximately forty-two hundred. I would guess that somewhere in the order of seventy-eight hundred to eight thousand are sent out. All of Roxbury Crossing, half of Adams Street and half of Hancock Street.

Q. How many people are employed to run that project, approximately? A. Including the local office staff?

Q. No. Including the—how many people are employed at the central locations concerning data input into programs? A. It fluctuates because of the contractual arrangement we have with a key entry service bureau. It's anywhere from 25 to maybe 35 people.

Q. Is it true that the Department of Public Welfare recently purged from its computer a certain segment of the non public assistance food stamp households? A. Say that again?

Q. Is it true that the Department of Public Welfare recently purged or erased from its computer data a group of non public assistance food stamp households? A. Are you referring to a quarterly—we have what we [56] call a quarterly purge. Once each quarter we determine cases that have been closed

for six months or longer, and/or if the person has died. If the reason for closing was death, we purge the file. Is that what you're referring to?

Q. No. I was wondering if recently due to a mistake some active files were purged from the system? A. I don't know, but I will offer my opinion that that did not happen.

Q. Okay. To the best of your knowledge it didn't happen? A. No.

. . .

[57] Q. Yes. Did the computer recently issue a batch of incorrect ATP's which had a seven added in front of the benefit amount transferring an ATP which would have been in the amount of ten dollars to one that would read seven hundred dollars, if you know? A. Not that I'm aware of.

Q. Now, I believe you testified that it's your understanding that the BSO computer is capable of being modified to generate individual notices concerning the 18 percent deduction. When did you—

Ms. JANOS: Could you be more specific about what you stated he stated the capabilities were?

Q. It's my understanding that earlier in his deposition he testified that the BSO computer programs are capable of being modified to generate an individual notice to the food stamp class in this case which is those households who received a reduction due to the change in the earned income disregard to the 18 percent, notifying the individual household of the actual amount by which their benefits were being reduced.

I'd like to know when you realized that [58] the BSO computer had that capability?

. . .

THE WITNESS: I believe I indicated that one, anything is possible. And, second, with some degree of difficulty that in fact some information could be provided to recipients. That's the assumption that you're reading back to me.

Q. The assumption is that programs could be modified to generate an individual notice? A. Yes.

DEPOSITION OF MARC BENDICK

[4]

Direct Examination

Q. Would you please state your name and address for the record? A. Marc Bendick, Jr. My address is the Urban Institute, 2100 M Street, N.W., Washington, D.C.

Q. Dr. Bendick, could you give us your educational background, and your specialties if any, in the areas that you concentrate in? A. I am a specialist in economics, and the economics of public benefit programs, and the administration of public benefit programs.

My educational background is that I have a bachelor's degree with honors from the University of California at Berkeley, with a specialization in economics and social psychology. I have a Ph.D. in economics in operations research from the University of Wisconsin.

Q. Do you have any other degrees in between? A. I have a master's degree in economics from the University of Wisconsin.

Q. And you mentioned that you have a Ph.D. in economics in operations research from the University of Wisconsin. Was [5] there any subspecialty involved in that? A. Within economics I studied at the Institute for Research on Poverty, which is a major national federally funded research center for the study of public benefit programs, and I specialized in poverty public programs involved with transfer of benefits to low-income people, including all the public assistance programs, and I also specialized in statistics and analysis of large scale data sets, such as census data as used in studies of problems of poverty, and public benefit programs.

Q. And for whom do you work now, Dr. Bendick? A. I work for the Urban Institute, which is a private non-profit research organization, which functions as a research and development center for the federal government, and for also

state and local governments. We also receive money from large foundations, and other public sources.

Q. And what do you do for the Urban Institute? A. My title is senior research associate, and I am in charge of doing research and directing the work of other people in the general areas of human resources, employment development, public benefit programs, and related problems having to do with poverty.

Q. What if any testimony for example may you have given in the course of your work here? [6] A. I've appeared before Congressional committees, as well as state legislative committees, discussing topics such as the efficient administration of public benefit programs. I've appeared before many professional societies such as the American Public Welfare Association, which is the professional society of the state and local officials, who administer programs such as Food Stamps and AFDC. I've been invited to speak at national conferences on the efficient administration of public programs, the prevention of fraud and abuse in those programs, cost-effective methods for operating programs. I made suggestions to Congress on revisions in the law, welfare reform, changes in the Food Stamp Program, and a wide variety of other benefit programs.

Q. What if any consulting have you done for, say other countries, or international organizations, or what have you? A. I've been a consultant on the same topics—that is, public benefit programs and their efficient administration to a number of international foundations. I've represented the United States in a working group at the United Nations on this subject. I have traveled to probably half a dozen different countries of Europe doing research on the subject. I've taught on the subject at a university in Britain, and [7] related activities.

Q. What if anything have you published, and if you have published anything, could you give us a representative sample

of what that might be? A. In the course of my work I've published in professional journals several dozen articles and chapters in books on the subjects I've outlined. I'm also an editor of a complete book on the subject. I've written probably more than a dozen pieces specifically on the administration of efficient operation of public welfare departments at the state and local level, and federal policy affecting.

Q. At this time Dr. Bendick, I would like to show you a document and ask you to look at it. Do you recognize that?

A. This is a copy of a resume describing my background.

Q. And did you prepare that? A. I prepared it.

Q. And is it accurate? A. It is accurate.

MR. HITOV: I believe it's already marked as Exhibit No. 1 for purposes of identification, and I would like to have this now submitted and annexed to the transcript of this deposition.

[8] BY MR. HITOV:

. . .

Q. Dr. Bendick, as I've stated this deals with a welfare department notice, this specific notice is a notice of reduction or termination. What experience have you had studying various notices from welfare departments? A. In the approximately half a dozen years in which I've spent studying public benefit programs, and their efficient administration, I've looked at probably hundreds of notices of various kinds, application forms, processing documents, [9] recertification forms, notices of changes and so forth. In addition to that broad general background, a number of years ago, probably five years ago, I was asked by the Department of Health and Human Services, which was then called the Department of Health, Education and Welfare, to undertake a large study for them of efficient and cost-effective administrative practices in public assistance programs. And in the course of that, I did extensive statistical analysis of the characteristics of appropriate efficient and effective notices for use in case processing in state and local public welfare offices.

Q. Now you mentioned you did statistical analysis. What if any experience and contact do you have with statistics and statistical processes? How often if at all, do you use them in your job? A. Well, I received training in statistical analysis as part of my graduate training, and as part of my routine daily activities as a senior research associate at the Urban Institute I use statistical methods of all kinds routinely, daily.

. . .

[10] BY MR. HITOV:

Q. Dr. Bendick, when you've analyzed earlier notices of whatever type, basically why were you analyzing those notices? What perspective did you bring towards that analysis? A. I was involved in analyzing notices as part of a general program of research on efficient and effective methods [11] in administering public welfare programs. That meant that my interest in the notices, which involved considerations such as whether they fitted in a reasonable way to the full range of case processing that was involved in maintaining a case, whether they permitted—whether they supported the efficient flow of information both from the agency to the client, and from the client back again. Whether they imposed an undue administrative burden on the agency, whether they communicated clearly to the client the information which was necessary for the client to be accurate in reporting to the agency, and for the client to understand the responsibilities that were placed on him as compensation for his receiving the benefits.

Q. And what if anything in a general sense have you found? I understand that you've been talking about notices of all types here, not just notices of change. But what if anything have you found that a notice should accomplish from an administrative perspective? What should its goals be? A. One of the most striking things we've learned in the course of the studies which we did was that notice, or a notice procedure which did not communicate very clearly to a client what was happening to him, and the basis for [12] why that was happening, obvi-

ously had adverse impacts on the client's sense of security, or the client's concerns about his or her own rights, but it was quite striking that we found that uncommunicative notice processes has serious adverse consequences on the administrative processes within the state and local public welfare agency. What I mean by that is, that when clients were not clearly notified of what was happening to them, a sequence of confused events was set in motion. Unnecessary appeals were generated, unnecessary phone calls were generated to case workers, clients were unable to in many cases provide information which was being requested of them in an expeditious manner, or in the form that was being required. And we found in short that, ineffective program notice procedures, and program notices had serious effects on the cost-effectiveness with which programs could be administered, and the appropriate prevention of fraud and abuse in the programs simultaneously with adversely affecting the well-being of the recipients of the program.

Q. I may have a sense of how you are answer from what you've just said, but what should a notice contain to accomplish its ends, and specifically to narrow it in this case, what should a notice of termination or reduction contain based upon your experience in this field, and if you would, tell us [13] why it should contain whatever? A. It's my opinion that when a recipient of benefits is being informed that his level of benefits is being changed, or his benefits are being terminated that, there are a number of pieces of information that are absolutely essential to communicate to the client. The first would be the reason that the change is being made. The second would be what his benefit levels are prior to the change. The third would be the benefit levels after the change. The fourth would be the exact method by which that change was computed. This all had to be laid out very clearly for the client, otherwise the client is left completely in the dark as to what is happening to him or her, and why, and has a

tendency to approach the agency to seek clarification of the information which is a very costly thing for the agency to handle. And also in the absence of this information, the client is unable really to make an accurate judgment as to whether the change which is taking place is justified or not.

Q. Dr. Bendick, in the case that this deposition is being conducted in regard to, the change that took place was a change that happened to many people, thousands of people simultaneously, what in the jargon of this case at least is being called a "mass change." Are the considerations that [14] you've just been discussing the same, or different, or what are those considerations in regard to such mass change situations?

A. In a mass change situation, in my opinion, exactly the same considerations hold. They are in a sense reinforced by the circumstances of mass change. What I mean by that is, that when an individual client whose case is being changed for some reason having to do only with his own case, receives a confusing notice, the most likely thing that client will do is call the agency—call his case worker to seek clarification. In a mass change situation you are talking about hundreds and thousands of people doing exactly the same thing.

When you get hundreds and thousands of worried phone calls from people literally flooding the agency with requests for clarification, the agency is thrown into administrative chaos, and the normal case processing breaks down. My experience is that a large amount of that concern and confusion can be prevented simply by adequate notice in the first place.

Q. Dr. Bendick, what if any experience do you have with computers, and the administration of welfare programs and/or the delivery of benefits by means of computer assistance? A. I am personally quite familiar with computers and [15] use them in my everyday work. I'm a qualified programmer. In addition, as part of studies of the administration of public benefit programs commissioned by the Department of Health and Human Services, I have specifi-

cally studied the application of computers to the public benefit administrative process as an outcome of the studies that I've mentioned, I was in the position of recommending to the Department of Health and Human Services that the federal government should put some federal money into assisting states to adopt more extensive and more sophisticated computer systems, and also I've made recommendations to state and local governments that they increase the extent of use of computers and sophistication of their use of computerized systems.

Q. The result of your study was that you recommended to HHS, I assume at the time it was HEW? A. Yes.

Q. That they consider grants to the states, and that you made recommendations to the states as well that they investigate and pursue computer delivery of services. What if any premises were your recommendations based upon? A. It was my judgment based both on extensive observation of state and local welfare operations, and extensive conversations with state and local administrators, and [16] statistical analysis of the experience of states which had developed computer systems, that computers are a very sensible instrument for the operation of public welfare programs. They can do the routine processing which is involved in maintaining public assistance cases in a very accurate and efficient way. They can be structured so that they can accommodate to the very frequent changes which occur in public assistance programs. They are ideally suited for the rapid production of mass changes such as in consideration in this case. They are a very flexible and accurate, and rapid sort of general tool for administration, and their record in operation in many states and localities across the country is that they do a marvelous and cost-effective job of running—of case processing public assistance programs.

Q. Dr. Bendick, have you seen and analyzed the notice in this case, dated December 26, 1981? A. Yes, I have.

Q. At this time I would like to show you a document. Can

you identify that? A. This is a xerox copy of the notices dated December 26, 1981, the English language part of the notice.

. . .

[17] Q. Dr. Bendick, relative to the factors that you've just been discussing, how would you categorize that notice? A. As I said before in the course of my work over the last half-dozen years on public benefit programs, I've had the opportunity to look in detail at literally hundreds of processing documents and notices in use in several dozen states, several foreign countries, and I believe that that basis of experience has given me quite a broad opportunity to see the full spectrum of notices. Some of them were of excellent quality, some of them were average and acceptable quality, and some of them were of very poor quality.

And I would say on balance that this notice would fall against that spectrum of what is current practice in a wide variety of states across the country, this notice would fall in the category of very poor quality.

Q. Vis-a-vis what characteristics? What is it that you are evaluating when you make that judgment? A. The first thing which this notice clearly lacks is that it does not communicate to the recipient undergoing a change precisely the sort of detailed information which I [18] stated earlier should be in that notice in order to avoid confusion—that is, it does not tell the recipient what his prior to change benefit level is, what his after change benefit level is, the basis for the change, exactly how the change was computed, and precisely it does not walk him through the steps of how that change was made so that he can understand whether he agrees with the information used in the computation.

Secondly, even setting aside the question of content, this notice is written at a level of language that in my judgment is very difficult for the average— No, I would say impossible for the typical public assistance recipient to understand, that is, it

is written with long complex sentences, large words—unnecessarily large words, the use of jargon, as well as rather unclear wording in complicated modes of expression. So it would be very difficult for a typical food stamp recipient to understand the point that it is trying to make.

Thirdly, I would say that the general layout of the material, the size of type, its layout on the page, and so forth, is not very easy to read physically.

Q. How, if at all, could it be improved? A. Well, the first thing I would do would be to insert the information which I have stated is essential for communication [19] of what's happening in the change. That is, I would have it state for each client individually, the prior to change level of benefits, the after change level of benefits, the basis for the change, the exact method of computation.

Secondly, I would see that the notice was reworded so that it would be written at a level of complexity which would match the educational—the literacy skills available in the food stamp recipient population, by which I would say that it should be written at a level which was readable—understandable by somebody with a sixth grade reading skill.

Thirdly, I would make other changes in the physical layout of the notice so that the print was larger, the lines were shorter, the paragraphs were better spaced, and it was generally physically easier for the eye to follow.

Q. Dr. Bendick, these changes that you have recommended or suggested, what if any benefit— Or, it's fairly clear from what you've stated the potential benefit that that would have to the recipient of the notice. What if any benefit would those changes have to the administrator, to the agency administering the notice, sending it out? A. It's without question that if clients are accurately and fully informed of changes that are going on in their case, then all that will be necessary is a written notice to [20] them in the majority of cases. In cases where a written notice is inadequate or too complicated to

read, doesn't contain the necessary information, the typical response of a client receiving a notice of change is to become quite concerned about his case, he's likely to call his case worker, or call the local agency to find out what's happening in his case, he's likely to visit the agency. A large amount of traffic is generated, and phone calls are generated, which, assuming in the majority of cases, the only problem is confusion and lack of information. All these trips are unnecessary, and all these telephone calls are unnecessary.

In addition, many clients receiving a notice that something is happening to their case, but not being told what is happening or why it's happening, are likely to file appeals in the case, generating a large number of appeals where they are filing for appeal simply to protect their rights in an effort to get information which they should have received in the first place. So bad notice generates a large amount of very costly case processing, it ties up eligibility workers, and generates administrative difficulties in the agency, all of which could have been avoided if adequate written notice had been provided in the first place.

It seems to me that I recall—on page 2 of this [21] notice, in Exhibit 2, there is the sentence:

"If you have questions concerning the correctness of your benefits computation or the fair hearing process, contact your local welfare office. You may file an appeal at any time if you feel that you are not receiving the correct amount of food stamps."

That of course, is a very appropriate sentence to have there. The point is, in the absence of adequate notification, many, many clients will feel forced to take those steps; contact the local welfare office, file an appeal. Where in fact, all they are really asking for is the kind of information that they should have been supplied in the written notice in the first place.

• • •

[22] Q. If it is in fact the case that this notice cannot be improved upon by the Massachusetts Department of Public Welfare using the computer system that they now have, what if anything is your opinion of that system from an administrative viewpoint? A. Having looked at literally hundreds of notices, from literally dozens of states and localities around the country, I would say that I've seen many instances where [23] departments, computerized or uncomputerized have done very much better jobs of generating notices of change. It's well within the state of the art. It's something which computerized systems handle very well, and localities that aren't computerized, there are other ways of doing things that achieve the same results.

If a state or local administrator said to me that their system was designed such that this was the only kind of notice that they could generate, I would say that there was something seriously wrong in that system; that somehow they are unable to achieve what public assistance administrators across the country achieved—what computerized public assistance programs all across the country achieve everyday.

Q. If however, that is the best, or that is the notice that's perusable without any further improvements from the system itself, do you have an opinion about the adoption, or the administrative decision, not from the clients' viewpoint, but rather from the viewpoint of the administrator of the system, do have an opinion of that decision to adopt such a system? A. Any system which has been put in place where this would be the only kind of notice that it could generate would be a very cost-ineffective system for the reasons I've [24] discussed earlier. It would be a system that would be very prone to serious administrative problems, and any administrator who set the system up that way, or any administrator who bought a computer system, or programmed a computer system, and if this was the only kind of notice that it could have generated, I would say has made a very serious administrative error in the establishment of that system.

Q. I would like to show you another document at this time. Would you look at it, and tell me whether you can identify it? A. This document is a copy of an article entitled, "The Literacy of Welfare Clients," which I wrote and published in the *Social Services Review*, which is the leading professional journal among persons involved in the administration of social services and benefit programs. It's published by the School of Social Service Administration of the University of Chicago.

Q. And with what does the article on the study deal? A. The article is a study of the literacy skills which are possessed by the low-income population in the United States, and the literacy skills which is required by the various public assistance case processing documents in use in public [25] assistance programs across the United States.

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Q. Dr. Bendick, what if anything did your study as recorded in that article show relative to reading levels vis-a-vis actual literacy levels? — I'm sorry, you couldn't answer that question since it didn't make sense. Education levels, i.e., the last grade reported finished by respondents and their actual literacy or reading level? A. Well, it's well-known that the low-income population in the United States, including individuals who are recipients of public benefit programs such as food stamps are less well-educated in general than the total United States population.

That means that they have—"they" the low-income people have completed fewer years of schooling than the general population. But that finding is just the beginning of understanding their actual literacy skills which are available among low-income people, because it is well-established in the educational profession that among low-income people, and among the population in general who tend to become school drop-outs, that actual reading skill levels possessed by [26] those individuals fall quite far below their nominal grade completion level. That is, someone who supposedly completed the

11th grade, probably reads at two, three, or four years lower level than the 11th grade. He might read at the 7th or 8th grade level for example.

Q. In your study Dr. Bendick, did you look at literacy rates as they relate to error rates, and if you did, what were your findings regarding those? A. Yes, we did some statistical analysis of the relationship between literacy problems, reading comprehension problems, and the error rates observed in public assistance programs. By "error rates" we mean the rates at which public assistance benefits were either given out to people who were entirely ineligible for program benefits, or the extent to which benefits were given out in incorrect amounts to people who were eligible for some level of benefits, but not the level that they were given. In some cases—the majority of cases, the amounts they were given was higher than they were entitled to; in some cases it was lower than they were entitled to.

And as a final finding of error, we looked at incorrect denials. That is cases where individuals who were actually entitled to program benefits were denied benefits. [27] We found that there was a strong statistical relationship between the literacy level possessed by public assistance clients and the error rate. That is, the more reading and literacy problems that a client population had in a locality, the higher the error rate tended to be in the agency. We interpreted this to reflect the difficulties which clients experience in trying to report in a timely manner, and accurate manner, and give full information to agencies when they had difficulty understanding, reading, and comprehending the various processing documents that were involved with their cases, including application forms, change notification forms, lists of documents they had to bring in to provide documentary evidence in support of their application and so forth.

Q. Dr. Bendick, a term that is somewhat in vogue now days among government personnel is that of the concept of the

"truly needy," and I've noticed in your article that you actually mentioned that phrase some years ago it seems, since this article is a few years old now, probably before it came into vogue. I'm not certain what you meant by "truly needy," so perhaps you could first tell us that, and then tell us what if any relationship you found between serving the truly needy, however you define that term, and complex [28] notices or forms? A. Operationally what I meant by "truly needy" in this article was those who were legally entitled to a certain level of benefits from a public assistance program.

To me it was a draft away from the principle of providing benefits only to the truly needy, when money was given to clients who were ineligible for program benefits, when too high benefits were given to clients who were entitled to some benefits, but not the level they had been given, or on the other hand, when clients were turned away and given no benefits, when they are in fact legally entitled to them.

Our statistical analysis clearly demonstrated that objective of targeting the benefits on those who are legally entitled to them, accurately administering the program, doing so without undue administrative burden on the agency, all those objectives were seriously adversely effected when case processing documents were written at a level of language—if use of words and complexity of sentences that made it impossible for the majority of the recipients of the program to understand the information that the document was supposedly communicating to them.

Q. At this time Dr. Bendick, I would like to draw your attention to pages 62 and 63 of the article that we've been [29] discussing, "The Literacy of Welfare Clients." What do you find there? A. On those pages I quoted three examples of the text from actual case processing documents in different programs and different localities. I put them in the article as examples of the sorts of language that public assistance clients would have a great deal of difficulty understanding, the kind

of language which contributed to the administrative problems and the failure to provide the benefits accurately to the truly needy, which was the subject of the article.

Q. What literacy level do those notices require? I understand there are three of them, so if you would give me an answer for each of those? A. Yes, there's a quotation from a notice for the Section 8, Rent Supplement Program, which was written in a level requiring the reading skills of a college graduate. There is a quotation from a Medicaid form used in the District of Columbia which requires the reading skills of a person with some college education, although not a college graduate. And the third sample is from a form used in Maryland for recipients of social services, and that also requires the reading skill level of a college graduate. I should put that in context by saying that the thrust of the article was to say that the [30] public assistance population in general should be judged to have reading skills at no higher than an eight grade level, so the gap between an eight grade level of reading skills and those of a college graduate or a person who attended college was a very large gap indeed.

Q. And how does the notice of 12/26/81 in this case, I believe it's marked Exhibit 2 herein, compare to those that you've listed in the article in your opinion in terms of difficulty? A. It is my judgment that the notice in this case is of a comparable level of difficulty, and by that, I directly mean incomprehensibility as the examples which I cited in the article. In fact, if I had had this food stamp notice in hand at the time I wrote the article, I would very seriously have considered quoting from this notice as an example of very bad administrative practices, and considered using a quotation from this notice in this article.

Q. Dr. Bendick, what if any agencies do you know of that have changed their notice practices based upon this article that we're talking about, "The Literacy of Welfare Clients"? A. I have been consulted by quite a number of

state and local public welfare agencies across the country concerning [31] their application forms and notices, and other case processing documents. I've given a number of speeches, and training sessions for public welfare administrators on the subject, and I've heard informally from those people that quite a number of different states and localities have modified forms and procedures based on the information which I presented to them.

In addition, the *Federal Register* of August 20, 1981 reports that the Social Security Administration revised its change notification forms used in the Supplemental Security Income Program so that all the notification forms were readable at the sixth grade level, and that according to the *Federal Register* of that date, the specific basis they used for picking the sixth grade level as the appropriate level for the notification document in that program was the research work which I did, and which is reported in the article marked Exhibit 3; they cited the article by name.

Q. I believe you mentioned in answer to my last question that the Social Security Administration had revised their notices to the sixth grade level. And what is your opinion of the effectiveness of that grade level from an administrative viewpoint? A. I was very pleased that they picked the sixth grade level, I felt that that really was the most appropriate target, [32] for writing of case processing documents. In the article marked Exhibit 3, I refer to the eighth grade level as an absolute upper limit of what should be acceptable for public benefit program processing documents, but I would be much happier with a sixth grade level. I believe that that sixth grade level is low enough to capture a vast majority of the clients of the programs—of the public benefit programs, at the same time it is still something which is quite feasible for agencies to deal with. It represents a very appropriate trade-off between administrative considerations and client accessibility considerations.

Q. Dr. Bendick, what if any information did you gather at the Plaintiff's request for this *Foggs* law suit? A. I was asked to use Census Bureau survey data to estimate the literacy skill levels available to recipients of food stamps in the State of Massachusetts.

Q. Did the information you had access to offer— What information did it offer you? Did it offer you access to information regarding literacy levels, or did it offer you information regarding education levels, or what? A. The survey data which are available offered information on the years of school completed by food stamp recipients in Massachusetts. As I said before that data is a starting [33] point for figuring out literacy levels, but it had to be adjusted downward to take account of the fact that persons of relatively low educational levels generally do not function at the reading skill level of the grade that they have nominally completed.

Q. And how many information searches did you pursue at this request? A. I did two separate computer runs.

Q. And could you identify them? A. In the first computer run we generated data concerning all food stamp recipient households in the State of Massachusetts. In the second computer run, we generated the same data, but for those households among all food stamp recipient households in Massachusetts who had earned income.

Q. Could you for purposes of describing this data, could you run through the process that you went through to retrieve it? A. Yes. The data we were working with was from a survey called the Survey of Income and Education, which was a special survey of 150,000 families nationwide, of whom some 6,000 were in the State of Massachusetts. It was a special survey commissioned by the United States Congress and carried out by the Census Bureau for the purposes of getting highly [34] detailed information on the characteristics of public assistance recipients in each state. It's the most recent, and most detailed, and best regarded data set for finding out

detailed information on public assistance recipients within as small an area as a state.

Q. And how did the Urban Institute, if in fact it did, come by this information? A. The Urban Institute possesses the computer tapes on which this information is stored. We use them in the course of our everyday business for research which we undertake under contract from the Department of Agriculture, the Department of Health and Human Services, and other federal agencies, as well as state and local agencies. We obtained the data directly from the Census Bureau who had gathered the survey data in the first place.

Q. In what form did you obtain that data from the Census Bureau? A. We obtained it in computer tape form.

Q. Does that mean that the computer reads the data directly? A. That's right.

Q. I'm not certain I understood you. Is this data used regularly in the normal course of institute business? [35] Yes. This very same data set is used by the Urban Institute in performing research for federal agencies such as the Department of Agriculture, in preparing information for the United States Congress, in preparing its research which is published widely in professional journals and in books.

Q. Keeping in mind that you have lay-people sitting here at the table with you, and will have lay-people reading your answer, could you explain how if at all, the Census Bureau study and your program extract of the information from that study attempted to allow for accurate extrapolation if it did from the sample to the whole? A. The survey of Income and Education actually interviewed only a small number, I said 6,000 households in the State of Massachusetts. That's a large number of households, but still is far less than all the households in Massachusetts.

The Census Bureau using its expert statisticians prepares what they call weighting factors, which are numbers which are used to multiply by the answers you get off the survey tape

to essentially blow that answer up, so it represents the answer that would have been obtained if the Census Bureau had gone out and interviewed every family in the State of Massachusetts. So for example, in the data which I extracted [36] from the Survey of Income and Education, we had data from 315 households receiving food stamp benefits in the State of Massachusetts, but using these weighting factors provided by the Census Bureau, we were able to blow those answers up so that they represent the answers which would have been given by the approximately—I believe it's 99,000 households in Massachusetts who receive food stamps.

Q. Is this the kind of data that's normally relied upon by people working in your field? A. Yes, this survey as I said is used regularly by the federal government, by research organizations such as the Urban Institute, by researchers at universities, and by all those working in the field. The United States Congress commissioned this particular survey, the Survey of Income and Education in 1976, specifically for the purpose of working out some formulas by which federal money could be allocated to states and localities. So the federal government is relying on the results of this survey in the way that they hand out millions and billions—literally billions of dollars of federal money. Similarly the information has been used in estimating the cost of various welfare reform proposals, or changes in the food stamp program. The Department of Agriculture in particular uses information from this survey to [37] estimate the effect of changes in food stamp laws and regulations, make estimates of the changes in the caseloads and the cost of the programs that would result.

Q. Dr. Bendick, what if anything do you have to illustrate the results of your searches? A. I prepared a table.

Q. You say you prepared a table. Would you please look at this document; do you recognize it? A. This document contains—it reports the data which I extracted from the Survey of Income and Education concerning the years of school com-

pleted by food stamp recipient households in Massachusetts.

. . .

Q. Dr. Bendick, would you, using the chart for reference, explain the results of your search? A. Well, there are a lot of numbers on this table, so let me just point to the key ones. First of all, in column "A," we report the total number of Massachusetts food stamp households, and this is again as of the year 1976. The numbers have changed slightly, but they are essentially the same today.

[38] According to row 7 in column "A," there are 170,000 of those households. A few minutes ago I said, 99,000, I was confused. According to column "B," row 7, there are 99,000 households receiving food stamps in Massachusetts who have earned income. There are 170,000 households who receive food stamps in Massachusetts whether they have earned income or not.

Now, it's my understanding in this case, it's actually the 99,000 households who have earned income, and receive food stamps, who are the sorts of households who have received the notice in question in this case.

What I've done in the rest of the table is to indicate the years of school completed by the heads of those households. I've reported it both for all Massachusetts food stamp households with earned income, and for all Massachusetts food stamp households whether they have earned income or not.

The table indicates that— Well, let me point first to column "F," row 3, which is the most important number of the entire table. That column is the cumulative percentage of Massachusetts food stamp households with earned income, the kind of households that would have received this notice, who had years of school completed of no more than eleven. [39] That is, these were not high school graduates. These were people who had either completed just elementary school, or the ninth grade, or the tenth grade, or the eleventh grade. They are not high school graduates. According to the table, in row 3, column

"F," 45.8 percent of all Massachusetts food stamp households with earnings fall into that category. That is, approximately rounding just slightly, approximately half of all food stamp households in Massachusetts have completed at most eleven years of school.

Now, let me repeat of course that this is years of school completed. This is not literacy levels. The literacy levels will be lower than that because of the factor we've been talking about before, which is people who become high school drop-outs eventually fall behind their grade level before they drop-out. But just looking at the moment at the nominal years of school completed, approximately half of the heads of households have completed no more than the eleventh grade.

If you look in the same row for column "E," we get the comparable number for all Massachusetts food stamp households whether they have earned income or not, and the number there, rather than the 45.8 percent that I've just quoted, the number there is 50.2 percent, it's a little bit [40] higher, but not substantially higher as these things go. Still—the pattern you see is still that about half of food stamp recipient heads of households are not high school graduates. They only have elementary school, or some high school, or up through the eleventh grade, but no more than that by way of formal education.

If you look at the next row of the table, that is row 4, you get the number for high school graduates. And again these are cumulative percentages for all Massachusetts food stamp households is 81.7 percent, have either less than a high school education, or they've completed high school, or high school graduates. 82 percent of the Massachusetts food stamp households with earned incomes have reached that level.

What that says is that only about 18 percent, whether you look at households with earnings, or ignore that factor and look at all the food stamp households, it would be about 18 percent of the Massachusetts food stamp households have any

post-high school education, nominal education. 82 percent of them approximately have high school credentials or less.

Q. Dr. Bendick, you've referred a couple times, and earlier you alluded to the basis of those credentials, but you've [41] referred to the difference between educational levels, and actual literacy or reading levels. What if any experience do you have with studies correlating educational levels of public assistance recipients with actual reading or literacy levels of those recipients? A. As part of the study which is reported in the article marked Exhibit 3, in Table 2 of that study, I list the five different studies which were done addressing the issue of what happens—what are the differences between actual reading skill levels of high school drop-outs and eventual high school graduates.

Q. Are you familiar with the methodology used in those studies, and if so, were they accepted methods, and how significant was the data that they produced? A. These studies are very large scale, major federally funded studies of this subject, and represent the state of the art as far as the profession is concerned, or what is known on the subject.

Q. Would it be the type of data regularly used by experts in the field? A. Yes.

Q. Now to be a little more specific, what did those studies show about the relationship between the last grade [42] finished by a recipient of assistance, and that person's actual reading level? A. Each one of these five studies clearly illustrated the pattern which I stated earlier, namely, that a person who is going to become a high school drop-out starts to fall behind his classmates a long time before he actually drops-out, so that for example, to cite just one example, one of the studies in the table, the one marked "Gates Reading Test," shows that in the tenth grade, there was already a 1.8 year skill level difference—reading skill level difference between eventual drop-outs and eventual graduates. That is, in the tenth grade, individuals who are destined in the future to become high school

drop-outs were already reading at approximately the— Had already fallen behind so they were reading at approximately the eight grade level, rather than the tenth grade level, which was the grade in which they were enrolled.

Applying this pattern to the sorts of data which I developed in the article in Exhibit 3, I concluded that all individuals whose nominal years of school completed was less than high school graduate, should be assumed to have reading skills levels at no higher than the eight grade level.

Q. Did any of the studies in the article, "The Literacy [43] of Welfare Clients," question actual high school graduates?

A. Yes. The same pattern actually extends even through high school graduates, particularly those who eventually fall into the low-income population and become public assistance recipients. The data is somewhat scanty here, but what studies have been done, showed quite clearly that when you are talking about a public assistance recipient who is a high school graduate, typically that person cannot read at a high school graduate level. He may be several years lower than that. In particular there were some studies done in the State of Illinois that are cited on page 59 of that article that indicated that public assistance recipients on average fell behind their claimed years of school completion by as much as 4.3 years. And so again, if you're talking about a high school graduate public assistance recipient, and apply that 4.3 year figure, you would make the assumption that that person quite probably cannot read at more than an eighth grade level.

Q. Based on your review of the data listed on the chart, which I believe is now Exhibit 4, and your knowledge of the correlations which you've just discussed, what should the reading level of the food stamp notice at issue here have been in order to have been administratively effective? [44]

A. Well, looking at row 4, columns E and F of Exhibit 4, I see the number 82 percent approximately in both columns there as the percent of the food stamp recipients in Massachusetts who

have high school or less education. As I've said based on the research that I did, my judgment is that those people typically can read at no more than an eighth grade level. We are talking about 82 percent of the total population of recipients of this—potential recipients of this notice.

It seems to me that an absolute maximum of an eighth grade reading level should be presumed in the notice shown in Exhibit 2—that is, no notice should have been sent out written at a level not accessible to something like an eighth grade reader. I would say preferably at a level accessible to a sixth grade reader. But an absolute maximum, no more than an eighth grade level, because otherwise you are leaving out more than four out of five of the recipients of this notice.

* * *

[45] *Cross-Examination by Counsel for Defendants*

By Ms. JANOS:

XQ. Dr. Bendick, you had stated that you had written a book on the subject early on, and I just was wondering if you could point out in your resume that book to me? A. The book is entitled, *Housing Vouchers for the Poor*, and I'm actually the editor of the volume, and it concerns an experimental program of housing allowance of public benefits for low-income people, specifically earmarked for rent payments. The subject of the book is both, how does the program work, and how should it be administered.

XQ. What was the name of your HHS study, or have you done several studies for HHS? A. We've done several studies. The one I've been referring to most frequently was published as an Urban Institute report which is listed in my resume as, "The Anatomy of AFDC Errors."

XQ. And was it in the course of that study that you examined the hundreds of notices from different states? A. It was in the course of that study that we did the main part of that,

although for a miscellany of other projects, I've examined quite a number of other notices, but that was the main work. [46] XQ. And when you say you've examined a number of notices, have you examined notices in every different type of welfare benefit program? A. I suspect it's virtually everyone.

XQ. You've certainly examined notices in the food stamp program, is that correct? A. Food stamp, WIC, AFDC, supplemental security income, regular social security, disability insurance, home heating and fuel vouchers. I could go on for about a half a dozen more I think if I thought about it.

XQ. Dr. Bendick, do you do any private consulting work as well as research for the Urban Institute? A. Yes, I do.

XQ. And could you just give me an example of the type of consulting work you've done? The type of private consulting work you've done? A. Well, the reason I will be in Accra-ghana is that I will be acting as a consultant to the World Bank, evaluating a proposed investment on their part, an employment and urban development scheme that they have proposed for the City of Accra.

XQ. And you've stated you've done some consulting work for different states as to the administration of their benefit [47] programs? A. Yes.

XQ. What states are those? A. I can list the ones I can remember offhand. South Carolina, Georgia, Michigan, Illinois, Pennsylvania. They don't include Massachusetts, but over the course of the years, I've probably dealt with some two dozen states.

XQ. And the general nature of your consulting work is what? A. Well, it's varied in a number of cases, but the general nature of what I've been a consultant on is ways to administer benefit programs in cost-effective ways, and that involves a number of considerations such as keeping the administrative burden of the program, the administrative costs of the program within reason, meeting federal fraud and

abuse targets, and avoiding abuse of the program by clients, insuring client accessibility to the program, and the maintenance of client rights. I've been involved really in virtually every aspect of the full range of considerations which get traded off in setting how programs operate.

XQ. Dr. Bendick, with regard to Exhibit No. 2 I believe, the Massachusetts notice. You stated earlier that you examined this notice to determine the level of comprehensibility and [48] readability of the notice. In your answer you stated a number of factors. Does your answer Dr. Bendick apply to both page 1 and page 2 of this notice? A. Yes.

XQ. So you examined page 1 and page 2 as a whole if you will, and made your determinations upon that? A. Yes. I looked at the notice as a single document.

XQ. Looking for a moment Dr. Bendick at page 2, could you tell me whether your opinion would change if page 2 were the only page that was received by the food stamp recipients? A. Well, I would say that page 2 just as a document in its own right is as difficult to read as page 1 and page 2 together, and in that sense, suffers from some of the defects which I mentioned before.

XQ. I understand Dr. Bendick that page 2 as well does not have the kind of detailed information that you testified earlier you think is necessary for notice of this type— A. That's right—

XQ. Could you just point me to the specific language on page 2 that you find troublesome in terms of comprehensibility or readability? Any particular words on page 2, any particular words in there that you think present more difficulty than others? [49] A. Well, I suppose I could go through the entire document word by word, but let me just point to a few examples that jump off the page at my eye. In the second section where it says, "Your right to a fair hearing," in the second line they use the word "reinstated." It strikes me that "reinstated" is a rather complicated word not found in the vocabulary of

very many not very well-educated people, and that would be quite a confusing term. It's rather central to the meaning of the sentence.

A second example which strikes me is at the top of page 2, where the first sentence is describing that, "The earned income deduction for food stamp benefits has been lowered from 20 to 18 percent." That's a very difficult concept in a way to grasp, because what you're talking about is a lowering of a deduction, which is a raising of your net income, which in turn leads to a lowering of your benefit. That's exactly the kind of thing that needs spelling out in great detail before someone who has relatively little education can follow. Here it's simply rather cryptically referred to, crammed into one sentence.

XQ. Is there anything else on page 2 that you think presents some difficulty? A. Well, as I say, my opinion is that the whole package [50] together is not comprehensible at the level that is needed to communicate to the clients. I could if you would like, go through each and every sentence and try to give a very comprehensive list, but I'm not sure that that would serve a good purpose. What I've given you is two examples—

XQ. Could you just give me one or two more examples and then I will go on? A. All right. This is again in the lower half of the page, "Your right to a fair hearing." The sentence on the page reads, "If your appeal is denied, the department has the right to recover from you any added benefits which you have received during the appeal process." Again, that's one of these complicated things where you are talking about pulling back something, which is an added benefit on top of some amount which would be your normal benefit, and then in order to understand what the sentence is reading, you also have to have in mind the concept you are talking about, a period of time, the appeal process during which the appeal is going on.

It strikes me again, that's a multi-part concept that is not easy for a person to follow, jammed together in one sentence. If it was spelled out in a whole series of very short sentences, and basically the arithmetic was done [51] before the client's eyes, that would be something that could be made comprehensible. As it stands now, it's the kind of thing where when I read it, and I've spent the last six years studying the designing these programs, I had a hard time thinking through exactly what that meant. I had to pause and think about it.

XQ. Is there anything else on here? A. I gave the example of the word "reinstated" as a vocabulary word that I felt was not in common use, and which does have common synonyms that would be much more comprehensible. Just looking around the page I see a number of other words which I would think would fall in the same category, "terminated" seems to me such a word. "Accordance," seems to be such a word. The phrase, "appeal is denied," there must be a simpler way to say that you've been told "no." Are those sufficient examples?

XQ. Yes, they are. So that in your opinion it's just with respect to page 2, the difficulty arises from the vocabulary as well as the sentence structure, as well as the format, is that what you testified to earlier? A. Yes, it has all those defects, and then of course, the defect that there's simply missing information.

XQ. Have you had any educational training yourself in [52] reading—I don't know what you would call the field, I guess in reading, or as a reading specialist? A. No, I have not.

XQ. Dr. Bendick, you have a chart here on the educational levels of food stamp recipients in Massachusetts generally, and food stamp recipients with earned income, the data is for 1976. Does the Urban Institute have any more recent data available to it? A. No, no more recent data at this level of detail exists. I believe that the data would not be significantly different if a survey were done in 1982, but the fact of the matter is that no such survey has been done.

XQ. Dr. Bendick, if you were to advise the State of Massachusetts at this point in these proceedings with respect to the changes that occurred last November and December, and the notices that went out, from a cost-benefit basis, how would you advise a new notice to go out to explain what has happened, or to clarify the situation for the recipients at this point in time? A. I'm not sure that I have the full range of information that I would need to fully answer that question, but I will hazard the opinion that since there are issues of retroactive benefits, and retroactive pulling back of benefits already [53] distributed and so forth, that there is no substitute for supplying a full, detailed, accurate record of changes to individual households to clear up the full course of the changes that were made, and the benefits that were paid in accordance with those changes as well as their current eligibility—the payment levels. So I would think that the most appropriate thing to do would be to supply the full set of information that should have been supplied in the past, plus what should be supplied as though the changes were taking place today.

XQ. With an accompanying explanatory notice as to what—A. As to what all that garbage is?

XQ. Yes. A. Yes. I would definitely think that that would all have to be supplied.

XQ. Are you familiar with the 1981 Omnibus Reconciliation Act? A. Yes, I am.

XQ. What were the changes that were required in various benefit programs as a result of that Act?

* * *

[54] A. There were changes made in a number of eligibility criteria for benefits. There were changes made in benefit reduction rates. There were changes made in work registration requirements, and they involved a variety of different programs, including food stamps and AFDC most prominently, but a number of other programs as well.

XQ. And are you aware of the federal time limitations on implementing the act? A. Yes, I am.

XQ. Are you familiar with the Massachusetts Welfare Department? A. Not in a highly detailed way, no.

XQ. You don't know its annual budget? A. No.

XQ. Or its staff size? A. No.

XQ. Or the number of departments it has? A. One of the documents which I am the author of is called the "Public Assistance Data Book," in which I compiled the first national compilation of that sort of data, and [55] I would be glad to look all those things up. But I certainly don't carry them around in my head, there being several hundred of those sorts of variables, and more than fifty states.

XQ. Do you know what type of computer the Massachusetts Department of Public Welfare uses? A. No, I do not.

XQ. Or its computer availability if you will? A. No, I do not.

XQ. Dr. Bendick, I believe you testified earlier that your opinion as to the type of notices welfare departments should issue in all types of benefit programs would be the same for individual changes in a person's benefit as well as mass changes, is that correct? A. Yes, that's correct.

XQ. So that it's your opinion for every mass change, and I use the word "mass change" in the sense that it is used by the federal regulations, and Massachusetts has similar regulations, for every mass change in the law, or in certain benefit programs, a state agency should be sending out a notice—the kind of detailed notice that you described earlier, is that correct? A. Yes.

[56] XQ. Do you know how many mass changes there are in any given year across the board in various benefit programs? A. To the best of my knowledge there is not a great deal of information known precisely quantifying that. One study which I can cite is one done in the State of Tennessee, in fact it was done in the context of their examining the

question of whether they should computerize their system or not, and they determined that there was one significant mass change somewhere in the various benefit programs administered by the Tennessee Department of Public Welfare occurring about once a week. So the public welfare environment is an environment of constant change occurring not only in individual households, but changes in the regulation and changes in the law.

XQ. You stated earlier that it was your opinion that a computer system can adequately and properly administer a welfare program of a state, is that correct? A. Well, normally the computer is a central part of it. In a computerized system, nowhere is the thing totally automated, but a computerized system means that the computer takes over a large part of the routine processing, with the so-called case worker, or eligibility technician doing a smaller amount of the routine case processing than in a [57] non-computerized system.

. . .

XQ. Dr. Bendick, obviously there are many different types of computer systems that a state would have available to it, or that a state would own, is that correct? A. That's correct.

XQ. Would you agree that certain types of computer systems are more adaptable to an overall administering of a program as opposed to handling bits and pieces of administering a welfare program? A. Across the fifty states there's a wide variety of degrees of computerization done in an incredible variety of ways. In some cases, states have gone to a highly integrated system in which the computer handles a very broad range of case processes. In other cases, the state is computerized to only very specific mechanical things, such as check writing. In some cases, states have gone to very large centralized [58] computer systems, say located in the state capital and running the entire state; in other cases, they have decentralized it at county level, where there's either a dedicated computer used for the welfare department only at the county level, or the county welfare department shares the computer with other departments of the county government.

In some cases, localities are now even using these little mini-computers which are no bigger than a desk. So in answer to your question, I think there's almost no universal answer. There have been some great success stories with almost every arrangement you can think of, and almost every type of computer you can think of.

XQ. And would those success stories be affected by the numbers of welfare programs the state is administering for example? — For instance, a state that's administering twenty different welfare programs for many hundreds of thousands of people might need a different computer capability than a state that is administering three or four different benefit programs for a much less number of people? A. That's obviously true.

XQ. Have you advised different states as to the cost of automating their welfare benefit program so as to bring about the kind of cost-effectiveness that you've discussed earlier? [50] A. My particular basis of consulting is not to go around as an advisor to states for specific computer systems. That's a specialized expertise, which is not my expertise.

XQ. In your opinion would it be advisable for a state to have on staff a reading expert to go through the various notices that are sent out to determine, or to insure a certain level of comprehension on that notice? A. In many public forums, including testimony before the United States Congress, training sessions and speeches to the national meetings of state and local public welfare administrators I have advocated that all the states and all their programs be very sensitive to the problem of the ability of clients to understand notices and case processing forms, and have recommended that they bring in reading experts to go over their current set of notices and processing forms, and redesign them as appropriate. Whether that should be a full-time in-house person as you've just suggested, or whether that person could most appropriately be brought in as a consultant would depend a lot on how big the state is, and how much work there is and so forth.

XQ. Do you know how many states would have their notices for all different kinds of welfare programs in the sixth grade comprehensible form? [60] A. I don't know, and nobody knows. No systematic study has been done of that. The Social Security Administration has as side program, which is the instance which I have cited before for having gone to the sixth grade level, operates nationwide. It is a federal program, and operates in every locality of the country, and certainly indicates the feasibility of doing that sort of thing in virtually every circumstance. There is no study of exactly what the local welfare departments have done with their own forms.

XQ. You stated earlier that one of the problems you had with the Massachusetts notice was the format of the notice. Would you advise the state against using a card as opposed to a full piece of paper?

. . .

THE WITNESS: Because I am not an expert on typography or format, I can't really testify in detail. What I can [61] say is that from the point of view of a qualified expert on case administration, and looking at the notice from the point of view of how it would be handled by clients and so forth, I would think everything being equal, it would be nice to have the information on one page, so there aren't so many different pieces of paper flying around, but that's hardly the most important consideration here. The things like the size of the type which is quite small—

BY MS. JANOS:

XQ. No, I wasn't asking about that. I was merely asking about the card itself? A. As far as I'm concerned from the point of view of case administration, it would be nicer if it weren't on a card, but if there are constraints that force it to be on a card, that that by itself is not a fatal flaw in any sense.

XQ. You referring in your article to several tables which showed a—I believe it was Table 2 and Table 3, which were correlations between literacy levels and education levels? A. Table 2.

XQ. Table 2, and that's not your particular study. You adapted that from someone else's study, is that correct, or is it several studies? [62] A. That is a summary of five different large scale studies, none of which I participated in; this is in Exhibit 3, Table 2.

XQ. Are the full titles of those studies noted in your notes at the end of the article? Any other reference to the studies themselves, when they were conducted, or by whom they were conducted? A. The full details of these studies and their implications for actually literacy levels is worked out in the study which I footnote in Footnote 2, which is a doctoral dissertation entitled, "The Economics of Compulsory Schooling," which was completed at the University of Wisconsin in 1976, and in that document you will find the full details of exactly what each of those five studies did.

XQ. And we've been talking this afternoon general about welfare programs which would include AFDC, food stamps, and other types of welfare programs. Would your answers apply across the board to all welfare programs? A. The general pattern of the answers applies to all those programs, and the article marked Exhibit 3 is in fact written in terms of all the programs together. The data in Exhibit 4 is specifically for food stamps, and basically indicates that all the general patterns shown in Exhibit 3 [63] hold precisely for the food stamp program in Massachusetts in this specific case.

XQ. Dr. Bendick, you've just stated earlier that you were not familiar with the specifics of the Massachusetts food stamp program, and other welfare programs. Do I understand then that you are not familiar with the kinds of administrative changes that were going on in Massachusetts during the period of time that this notice was developed? A. Well, the food stamp program is a federal program which is operated in a uniform manner nationwide, and the particular changes which are at issue here are those triggered by the Omnibus Reconciliation Act which you mentioned earlier which is a

piece of federal legislation. And therefore, what's going on in Massachusetts with some minor modifications is essentially what's going on all across the country.

XQ. The kinds of changes pursuant to law that the welfare department had to make? A. That's right.

XQ. In your opinion Dr. Bendick would the sixth grade or eighth grade level that you feel is optimal apply to all notices under the food stamp program which would include initial application, increase in benefits, decrease in benefits, change of whatever nature? [64] A. Yes, that is what I have publicly advocated, that the entire case processing system should be pitched at that level because that's where the clients can understand what's going on.

XQ. Have you given any advice to the IRS in terms of the comprehensibility of their tax forms? A. As a matter of fact, I've worked very closely with the reading expert hired by the IRS. You may have noticed that this year's tax forms are much better than last year's, and last year's were much better than the year before. And that expert and I collaborated, he was kind enough to read the article in Exhibit 3 before it was published, and we have actually collaborated on a number of the instances where I've given advice to state and local departments.

XQ. And your advice would be as well, that the tax forms should be at a sixth grade level? A. I believe that the objective toward which he and the IRS are working.

XQ. Dr. Bendick, you are not being paid for your testimony in this case, is that correct? A. That's correct.

XQ. You are providing your testimony because this is an important case in terms of administering welfare programs? [65] A. That is correct.

. . .

Re-examination by Mr. Hitov

[66] Q. Dr. Bendick, did your earlier opinion have anything to do with the reason why a computer system couldn't do a given operation in terms of leading to the conclusion that it was inadvisable to adopt it if it couldn't, or was it based simply upon the fact that it couldn't accomplish that goal, regardless of the underlying reason? A. My earlier opinion was based on looking at the question of notice as part of a total case processing system, looking at all the considerations that go into that total case processing system. It of course did not take account of factors external to the Department of Public Welfare about which I have no knowledge. But from the point of view of efficient and effective administrative practices within a public welfare department, I stand by my answer that any [67] system—if it is true, if it were true that this is the only sort of notice that system could generate, then I would say some serious administrative error has been made in adopting that system.

...

EXHIBIT NO. 4

YEARS OF SCHOOL COMPLETED BY HEAD OF HOUSEHOLD	A*	B**	C*	D**	E*	F**
	NO. OF MASS./CHUSETTS FOOD STAMP HOUSEHOLDS 1976	% OF MASSACHUSETTS FOOD STAMP HOUSEHOLDS 1976	CUMULATIVE % OF MASS. FOOD STAMP HOUSEHOLDS 1976	TOTAL w/EARNINGS	TOTAL w/EARNINGS	TOTAL w/EARNINGS
1 Less Than Eight	19,175	5,767	11.2	5.7	11.2	5.7
2 Eight	17,228	9,070	10.1	9.1	21.3	14.8
3 Nine Through Eleven	49,221	30,926	28.9	31.0	50.2	45.8
4 High School Graduate	53,392	36,440	31.5	36.4	81.7	82.2
5 College: 1 to 3 Years	15,084	11,203	8.8	11.3	90.5	93.5
6 College Graduate	15,984	6,433	9.5	6.5	100.0	100.0
7 TOTALS	170,084	99,839	100.0	100.0	100.0	100.0

* Based on 315 households in the Survey of Income and Education — 1976

** Based on 186 households in the Survey of Income and Education — 1976

EXCERPTS FROM TRIAL TRANSCRIPT
OCTOBER 12, 1982

[17] STEPHANIE ZADES . . .

Direct Examination

Q: Would you please state your name and address?
A: Stephanie Zades. I live at 62 Road in Indian Orchard,
Mass.

. . .

Q: Do you work? A: Yes, I do.

Q: Full time? A: Yes.

Q: Do you have a family? A: Yes. I have one daughter.

Q: Where are you employed? [18] A: I am employed
by Child World.

Q: Were you working in December of 1981? A: Yes, I
was.

Q: Where was that? A: At Child World.

Q: Was that full-time? A: No. I was working approxi-
mately 18 hours a week.

Q: Do you receive any form of public assistance at the
present time? A: No, I do not.

Q: Were you receiving any form of public assistance in
December of 1981? A: Yes, I was. I was receiving Food
Stamps and partial AFDC.

Q: At this time, I would like to draw your attention to early
December, 1981. What, if anything, did you receive from the
Welfare Department?

. . .

A: I received a blue card.

Q: At this point I would like to show you something that is
[19] marked Plaintiffs Exhibit 1. Do you recognize this?

A: I received one of those.

Q: What was it? A: It was telling me that my Food

Stamps were either going to be cut or terminated. It didn't tell
me when. It told me three different times that I could appeal.
It told me if I did not do it before the first — well, before 90
days were up, that I couldn't get a hearing, but then at the end
it told me that I could appeal at anytime.

Q: How did that make you feel? A: But I didn't know
what I was appealing. I didn't know if I was appealing a ter-
mination or a cut.

Q: At this time I would like to direct your attention to later
in December, 1981. What, if anything, did you receive from
the Department of Public Welfare? A: I received the orange
and yellow card.

MR. HITOV: Your Honor, I believe that the Court has
the only copy of the orange and yellow card.

Q: Ms. Zades, at this point I would like to show you two
cards. Do you recognize these? A: Yes. Those are the same. I
received those.

Q: Are these the cards you were just referring to? A: Yes.

Q: Between the time that you received this blue card that
I [20] showed you earlier and the time that you received
this card, how many, if any, other Notices did you receive
from the Welfare Department? A: Two Notices.

Q: Between the time you got the first card and the time
that you got this card? A: Right.

Q: What did you do when you received these cards? A: I
turned in or I called my Social Worker and she couldn't tell me
anything. She said we knew about these things.

MS. JANOS: Objection, your Honor.

THE COURT: You can't say what she said. As a result
of what she said where did that leave you?

THE WITNESS: Absolutely nowhere because the lady
could not give me an answer. So I called my attorney and I
sent in an appeal. I didn't know where I was going.

. . .

[21] Q: Did you attempt to read the Notice? A: Oh, yes.

Q: Did you understand them? A: I understood the words as to what they were telling me.

THE COURT: What is your educational background? Did you graduate from high school?

THE WITNESS: Yes, I did.

THE COURT: Did you go on from there?

THE WITNESS: No, I didn't.

THE COURT: And you have been working since then in the outside world?

THE WITNESS: Yes, on and off.

THE COURT: What type of occupations have you held?

THE WITNESS: Mostly retail.

THE COURT: Where you have to talk to the public?

THE WITNESS: Right.

Q: When you called your Social Worker did she tell you anything about what was going on at that point?

MS. JANOS: Objection, your Honor.

MR. HITOV: Your Honor, we believe that this is entirely relevant testimony and necessary testimony to establish that the Notices were not effective, and [22] that there was an invitation to call your case worker and that this was a hollow gesture.

THE COURT: Do you intend to call any representative from the Department of Public Welfare, any case worker in the area?

MR. HITOV: No, we do not, your Honor. What the case worker told her client is an admission against interest and is admissible.

THE COURT: Well, beyond the individual case worker, did you go to a supervisor?

THE WITNESS: No, I did not.

THE COURT: You just limited yourself to that one Social Worker that you had dealt with in the past?

THE WITNESS: Yes.

THE COURT: All right. Well, this is a jury-waived trial. I have to know who is telling what to me and what I can regard as the truth or otherwise.

What kind of question did you put to the supervisor?

THE WITNESS: I asked her if I was going to be cut.

THE COURT: Was this face-to-face?

THE WITNESS: No, it was over the telephone.

THE COURT: You were not able to show that person the type of card that you had before you?

THE WITNESS: No, because of the hours that I [23] worked I was unable to be able to go down there without losing a day's pay.

THE COURT: How did you describe the card to the individual that you were speaking to?

THE WITNESS: I told her that they were print-out cards that they had mailed, that they were like the blue card that I had received the first of the month, and that she knew about.

THE COURT: Did you read the case worker the information that was on that particular card?

THE WITNESS: No, I did not.

THE COURT: What kind of questions did you ask her?

THE WITNESS: I asked her if I were going to be cut or terminated and she said she didn't even know anything about the card, that Boston handled everything, that the recipients here knew more about what was going on with the cuts than they did in their own office, that she really couldn't give me any answers — that what ever cut — that they did — wouldn't matter. It wouldn't amount to much.

THE COURT: What did you do after that?

THE WITNESS: I called my attorney.

THE COURT: And your attorney filed an appeal?

THE WITNESS: Yes.

[24] THE COURT: Was he able to determine from the card, the print-out information, to whom the appeal would be directed? He was able to determine that all right?

THE WITNESS: I really can't answer.

THE COURT: My point is: were your rights protected by a timely appeal by your attorney?

THE WITNESS: Yes, oh, yes.

Q: What happened with your appeal? A: I was never notified of an appeal date. I received a phone call from my Social Worker one day asking me what happened to me. I asked her what she meant and she said, "You were supposed to be here this morning for an appeal," and I said, "I was never notified".

• • •

Q: What happened then? A: I called you.

Q: What happened following that? A: You called and set up another appointment for another appeal hearing.

Q: Was that hearing ever held? A: Yes, it was.

Q: Was that hearing on some other issue? A: It was held along with the issue that they were [25] going to terminate me from AFDC.

Q: What was the result of that hearing? A: I won the hearing. They had to go through and redetermine my whole case.

Q: Why was that? A: Because there had been so many notices sent out over such a short period of time nobody knew what I was supposed to receive.

Q: Who was at the hearing for the Department? A: My Social Worker was present, and I believe the woman's name was Diane Miller.

Q: Was your Social Worker able to explain what had happened? A: No.

MR. HITOV: At this time, your Honor, I would like to have marked for identification as Plaintiffs Exhibit 13 — if the Court would indulge us, I have the original here and I also made a copy so the client's file would remain intact.

• • •

(Appeal Decision of Division of Hearings Massachusetts Department of Public Welfare marked Plaintiffs 13)

Q: Do you recognize this? A: Yes. This is the letter that I received saying my case had been approved.

• • •

[26] THE WITNESS: I received this in the mail telling me that it had been approved and that they were going to redetermine my case.

MR. HITOV: Your Honor, I would like to have this submitted into evidence.

THE COURT: It may be admitted.

(Plaintiffs 13 for Identification received in evidence.)

• • •

Cross Examination by Mr. Aloisi

XQ: Good morning. A: Good morning.

XQ: Ms. Zades, I am Mr. Aloisi, an Assistant Attorney General.

Ms. Zades, could you give me an indication of jobs you have held for Child World? Are they retail jobs? A: Yes, retail sales.

XQ: How long have you been working in the retail sales business? A: Even back when I was in high school.

XQ: I won't ask you for your age, but it was for awhile? A: Awhile, yes.

XQ: What precisely do you do in your current job? [27] A: I work for Child World.

XQ: What tasks do you perform? A: I am Manager of the Electronics Department for Child World.

XQ: What does that mean? A: I sell home computers.

XQ: Oh. What skills do you find are necessary to perform your job right now? A: What what?

XQ: What skills? A: I have to know how to read and write and talk to the public.

XQ: Do you deal occasionally or routinely with forms in your job? A: Constantly.

XQ: What kinds of forms? A: Refunds, credits, I handle a good deal of paperwork.

XQ: Notices? Do you ever publish notices yourself? A: No, I don't.

XQ: Do you read them? A: Surely.

THE COURT: What about instructions or booklets on how to operate home computers?

THE WITNESS: Yes.

THE COURT: Do you read the booklets and then [28] describe how, in fact, the computers operate and function?

THE WITNESS: I go play with it and try it out.

XQ: So you operate these computers? A: Yes, I get to play with them.

XQ: Do you recall the first time that you participated in a Food Stamp program? A: The very first time? No.

XQ: Can you approximate how many years it has been since you have participated in a program? A: I couldn't even give you a guess, not even a wild guess.

XQ: Longer than a year? A: Oh, yes.

XQ: Have you in the past been on other Public Assistance Programs? A: Just AFDC.

XQ: How long were you on that, approximately? A: Full or partial?

XQ: Either. A: On and off for about 15 or 16 years.

XQ: Over that course of time were you also during some of that period or all of it — do you think you might also have been on the Food Stamp Program as well? A: Yes.

XQ: During those 15 or 16 years can you approximate how many [29] Notices you received from the Welfare Department? A: There was a time we rarely ever got a Notice from them. If anything, you had a visit from your worker and she explained to you what was going on, and that was it. They didn't mail out all this other stuff that they do today.

XQ: So how many do you think you have received over the course of time since they started revving up their Notice motors, more than 12? A: Probably.

XQ: More than 20? A: It's a possibility. I couldn't give you an answer.

XQ: Have you ever before participated in a lawsuit against the Welfare Department in which you were a named plaintiff?

A: No.

* * *

XQ: Do you have children? A: Yes, I do.

XQ: Do you have occasion to deal with forms in your daily [30] life, tuition forms? A: Yes, I do.

XQ: Loan applications? A: Yes.

XQ: Do you have any college age children? A: No.

XQ: With the forms that you have received as part of your routine life, utility forms, for example, loan applications, tuition loans, have you had occasion to find yourself not understanding those forms? A: I have had one or two.

XQ: What do you do when that happens? A: I go to somebody that can give me the answer.

XQ: And who is that? A: It depends on what it is. If it is something to do with work I go to my manager. It all depends. If I have a problem over an electric bill I call the Electric Company. You go to the person who can give you the best answer to your problem.

XQ: Are there varying reasons for your inability to understand those kinds of things or are they unique to a particular Notice? A: The Notice was just confusing. It kept referring you back to the other card.

XQ: The Notices in this case aside for a second, can you [31] recall for me any Notices in the past that you have received from the Welfare Department that you found difficult to understand, if any? A: No. I don't think I have ever had a problem with a Notice that I had received before.

XQ: So prior to the Notices which are in issue in this case

you never had any difficulty understanding those from the Welfare Department? A: No.

XQ: Let me show you Plaintiffs' Exhibit 1 and ask you to look at that. On that Notice are there any words that you find you are unable to understand? A: The words are fine.

XQ: You understand each of them? A: The words are great. It's the double-talk that will get you.

XQ: What do you mean by that? A: It tells you you can appeal within, you know, ten days. Then it tells you that you can appeal up to 90 days. But after that you won't get a hearing. I mean it doesn't make sense because at the bottom it says that you can appeal at anytime. Well, if you can't get a hearing after 90 days what good is it going to do you to send in an appeal?

XQ: But you understand precisely what it says? [32] A: I understood that they were either going to cut me or terminate me. I wanted to know what they were going to do.

XQ: I am sure you did. A: I mean, if somebody told you they were either not going to give you a raise or they were going to give you a raise you would say, "Well, which one?"

XQ: When you got this notice what is the first thing that you did? A: I read it.

XQ: How many times? A: How many times?

XQ: Yes. A: Not too many with my eyesight. The print is small.

XQ: Less than three? A: No. I have to say that I read this more than three times.

XQ: Well, the first time? A: The first time I saw it I think I read it through once and then I stuck it on the counter in the kitchen and I may have passed it again and picked it up.

XQ: How many times did you read it before you called your case worker? A: On this one I didn't call my case worker. I called on the second Notice.

[33] XQ: Let me ask you to take a look at this Notice, these two cards, and I will ask you the same question which is, if there are any words on either of those cards that you do not understand? A: With the Spanish side up? You had better believe that there is.

XQ: Are there any English language words that you do not understand? A: No. I understand the words.

XQ: Okay. And how many times did you read that when you got it? A: This one I never finished.

XQ: You never finished it? A: I did not finish it.

XQ: You never read it through? A: I got tired of being bounced back to Page 1.

XQ: So you never read the whole thing once through? A: Fully? No.

XQ: Have you ever brought an administrative appeal from the decision of the Department of Public Welfare that related to your benefits? A: I have gone on appeal.

XQ: How many times have you brought appeals? A: Twice.

XQ: In the whole 15 year period? [34] A: Yes.

XQ: And did you appeal from this Notice? A: This one, right.

XQ: Did you have a hearing —

MR. HITOV: Your Honor, I believe we have gone over this testimony. This was mentioned earlier.

THE WITNESS: That was the hearing that I was never notified of.

THE COURT: Did you ever get a decision?

THE WITNESS: Yes.

THE COURT: Did you get reimbursed?

THE WITNESS: I did. There had been a mistake and they were ready to terminate my AFDC and then they realized they had made a mistake.

XQ: Do you recall the name of your case worker? A: Lucille Compton.

. . .

[35] *Redirect Examination by Mr. Hitov*

Q: Ms. Zades, Mr. Aloisi asked you about other Notices that you had received in the past. How did this Notice, the Notice on the orange and yellow card, compare with in terms of difficulty with any Notice that you had received? A: The print was even smaller.

Q: You will have to speak louder. A: The print was even smaller.

Q: How about the difficulty of understanding? A: Well, it bounced you back and forth so much you didn't know what you were reading.

Q: You also in response to one of Mr. Aloisi's questions stated that you only got halfway through or part way through the second Notice, the orange and yellow card. What were the reasons that you didn't finish the Notice? A: Number one, the print was much too small for me to be able to read.

Q: Were there any other reasons? A: Yes. It just didn't seem to make enough sense. It was confusing.

. . .

GILL PARKER (Sworn)

Direct Examination by Mr. Hitov

Q: Would you state your name and address for the record, please? A: My name is Gill Parker and I live in Springfield at 329 Carew Street.

Q: Does anybody in your family work? A: Yes, my wife does.

Q: Where? A: At the UNICEF Corporation.

Q: What is the last grade you completed in school? A: The 11th grade.

Q: Do you receive any benefits of any kind from the Department of Public Welfare? A: Yes, I do, Food Stamps.

Q: In the month of December, 1981, did you receive anything from the Department? [37] A: Yes, I did.

Q: What is the first thing that you received? A: A form

designating that my Food Stamps were being terminated or reduced.

Q: At this time I would like to show you something that has been marked Plaintiffs Exhibit 1. Do you recognize that?

A: Yes, I do.

Q: Is that the Notice that you just referred to? A: Yes, it is.

Q: When you got that Notice, Mr. Parker, what did you do with it? A: I read it thoroughly.

Q: How many times? A: Several, three or four.

Q: Did you understand what it was telling you? A: No, I did not.

Q: What did you do then? A: I called Mr. Robert Mack at the Welfare Department.

Q: Do you happen to know what Mr. Mack's position is? A: Supervisor-Director.

Q: Was he able to help you? A: No, he wasn't. He told me he was not aware of the cards and he couldn't tell me whether or not I was being terminated or reduced because he wasn't aware of — they were coming from Boston.

[38] Q: What did you do after receiving the card? A: I contacted my counsel.

Q: What did you do then? A: Appealed.

Q: Did you receive anything else from the Welfare Department in December? A: Yes.

Q: What was that? A: Another card and it had much smaller print on it.

Q: At this time I would like to show you two cards that have been marked Plaintiffs Exhibit 2. Do you recognize these? A: Yes, I do.

Q: Are those the cards that you just referred to? A: Yes, they are.

Q: Did you read these cards? A: Yes, I did.

Q: Did you skim them over or did you try and work them out or what? A: I read the card thoroughly.

Q: And did you understand them? A: No, I did not.

Q: Did you seek any help? A: Yes. I called a friend of mine, and we read them thoroughly. My wife read them. After one or two readings [39] I finally needed a magnifying glass because the print was too small.

Q: You mean literally? A: Literally. When I wanted to make an issue of it my wife said, "Just throw the cards out. Don't bother with it." And when I asked her, "Why?", she said, "Well, they are going to do what they want to do anyway and there is nothing we can do about it." I disagreed with her. I have a lot of faith in the system.

Q: After you had gone over the yellow card with your friend and with your wife, did you understand it then? A: No, neither one of us did.

Q: Mr. Parker, before you got either of the December Notices, do you remember what your benefit level was with Food Stamps? A: \$72.00.

Q: During this period of time, back in December of 1981, at the end of what month or what time did your certification period with Food Stamps end, do you remember? A: No.

Q: Do you remember whether or not you were recertified for Food Stamps around the time that you got these Notices? A: Yes.

Q: Between the time that you received the first Notice and the time that you were certified were there any changes in your circumstances? [40] A: No.

Q: When you went for recertification did you report any information you had not reported before? A: No.

Q: What happened following your recertification? A: My Food Stamps went from \$72.00 to \$106.00, and when I asked them why that happened, they said, "Don't worry about it. It's okay," and it bothered me, so I said, "Gee, I would like to know. I was only getting \$72.00 and now I am getting \$106.00," and they just refused to give me an answer.

MR. HITOV: I have no further questions.

THE COURT: What happened to your benefits once the orange and yellow card came out? Were they eventually reduced?

THE WITNESS: No, sir.

THE COURT: You continued to get the \$106.00?

THE WITNESS: No. From the time I was receiving \$72.00. And then I got \$106.00, and I don't know why, and I still don't know why.

THE COURT: My point is: what happened to the \$106.00 thereafter? Did you continue to receive it each month?

THE WITNESS: Yes, until just recently.

THE COURT: All right.

[41] *Cross Examination by Mr. Aloisi*

XQ: Good morning. A: Good morning.

XQ: Mr. Parker, would you tell us if you are personally employed? A: No, I am not.

XQ: Have you been employed in the past? A: Yes.

XQ: Would you tell us in what jobs, what kind of jobs? A: Occasionally I instruct in the Martial Arts and I am occasionally a game technician.

XQ: What does that mean? A: A game technician means that I am part of a very complex game called Advanced Dungeons and Dragons. If you are unfamiliar with it, it is a fancy role playing game, and I am used as a reference at the Springfield Library for this game.

XQ: Would you give us a very brief synopsis of what that means, what that game means? A: It is a very complex game that is involved with a great deal of precision and perfection. It is a game that entails a great deal of reading and comprehending, to be brief.

XQ: What kind of skills do you find are necessary to perform the functions of a game technician? [42] A: It is

based on a referee status who controls the flow of the game. As the participants in the game have to make decisions I must referee over it. In order to do this my skills are involved in reading and comprehending.

XQ: Reading what? A: Reading manuals and modules and technical advice that flows through the books. There are five books involved in this game. The modules come on a regular month to month basis.

XQ: Would you describe them as complex? A: Excuse me?

XQ: Would you describe the manuals as complex? A: Yes, I would.

XQ: And you have no problem understanding them? A: No, I do not.

XQ: How long have you been receiving Food Stamps? How long have you been in the Food Stamp Program? A: Approximately a little over a year, maybe more.

XQ: Are you currently receiving any other public assistance? A: No, sir, I do not.

XQ: Have you ever in the past? A: Yes.

XQ: What was that? A: For the kids, \$50.00 every other week for the kids.

[43] XQ: Do you know what that program was? A: I don't know what it is called. Aid To Dependent Children, I believe.

XQ: The AFDC Program. How long were you involved in that public assistance program? A: I couldn't really say. My wife was receiving benefits when I met her, and shortly after that they were terminated.

XQ: During the time that you were on public assistance programs, how many occasions do you recall receiving Notices from the Department of Public Welfare? A: I couldn't give you an exact number but they were few.

XQ: Prior to receiving the two Notices that are at issue here

today, prior to that time can you recall receiving a Notice from the Welfare Department that you did not understand? A: No, sir.

XQ: Have you ever participated in a lawsuit as a named plaintiff that was brought against the Department of Public Welfare? A: Well, if you mean by a lawsuit did we have a hearing? Yes.

XQ: I don't mean an administrative hearing. I mean a lawsuit in court. [44] A: No.

XQ: What was it about these particular Notices that prompted you to bring a lawsuit against the Department of Public Welfare? A: Well, after I read the card and found out — you know, when you are just barely getting by and you read a card and it says that your Food Stamps that you depend on a great deal are either going to be taken away from you or cut down drastically — you know, right away it rings a bell quick. So that's why I made an issue of it and contacted my counsel.

XQ: You say that you depend upon Food Stamps a great deal? A: Sure. Anybody that receives Food Stamps probably knows what I am speaking about.

XQ: Does that affect in any way the manner in which you deal with a Food Stamp Notice when you receive it? A: No. When my Notices come in the mail I look at them all with the same kind of intent. You know, when I get a Notice I figure it is important enough for me to open it up and take a good look at it.

XQ: In the general course of your life do you have occasion to receive Notices or forms, for example, from utilities or school tuition forms or that type of thing? A: Yes. My daughter goes to Cathedral and I fill out forms for my credit cards and I have to fill out forms [45] for my utilities.

XQ: Do you recall an occasion in the past when you have ever had a problem understanding any of those particular forms or applications? A: No, sir.

MR. ALOISI: I would like to have this marked for identification.

(Notice of Eligibility for Recertification marked Defendants Exhibit A.)

XQ. Would you please look at this? I ask you if you know what that is? A. Yes, I know what it is.

XQ. What is it? A. It is a Notice of Eligibility for Recertification.

XQ. Do you recall receiving that? A. Yes.

XQ. When did you receive it? A. The date says 1/27.

. . .

[46] XQ. When you received it what did you do with it? A. This particular form?

XQ. Yes. A. I'm sorry. I don't remember.

XQ. Well, did you read it? A. Well, if I didn't read it my wife read it. I don't remember right offhand.

XQ. You don't recall reading it? A. Can I take a minute to look at it?

XQ. Surely. A. I couldn't say. I couldn't say that I remember reading it. That doesn't mean that I didn't though.

XQ. All right. Do you recall in a deposition that I took of you that I showed you this Notice? Maybe I should show this to you.

MR. ALOISI: The original is on file, the deposition.

MR. HITOV: Do you remember the exhibit number?

MR. ALOISI: 6.

[47] XQ. This is a copy of a transcript of your deposition. I asked you about this particular Notice.

My question was: "Did you read it?"

Can you read your answer? A. Yes, sir.

XQ. Does that refresh your recollection as to whether you read this or not? A. No, sir. I'm sorry.

XQ. You might have been mistaken? A. No. It is just that it has been awhile since the deposition. My mind is not a tape recording. I can't remember every single thing in my life.

XQ. Let me move on then.

MR. HITOV: Excuse me, your Honor. I got confused by the question. Is it clear on the record that the Notice that was shown to Mr. Parker was not the Notice we have just been talking about?

THE COURT: Was the Notice that you showed him before the same Notice that you showed him during the deposition?

MR. ALOISI: Yes. He says he can't recall.

MR. HITOV: Your Honor, I am not totally certain that those are separate Notices. The Notice that I have marked as Exhibit 6 at the deposition has a different date on it than the Notice Mr. Aloisi has been [48] discussing.

MR. ALOISI: You are absolutely right.

MR. HITOV: I would like that testimony either stricken or the record corrected to read that they were different Notices.

MR. ALOISI: It is plain that it is not the same Notice and it is also plain that he doesn't recall.

THE COURT: All right.

XQ. I would like to ask you if you got the Notice in this case. I ask you to look at this card. Do you recognize that card? A. Can I take a minute to look at it?

XQ. Sure. A. I recognize the card.

XQ. What is it? A. It is a card from the Department of Public Welfare. What do you want me to answer exactly? It is a card from the Department of Public Welfare.

XQ. That's fine. Did you receive that Notice? A. Yes, I did.

XQ. What did you do with it when you received it? A. I read it thoroughly. And I had my wife read it.

XQ. Are there any words in that card that you do not understand? A. Not to my immediate attention, no.

[49] XQ. I ask you the same question with respect to these cards. You may look them over. Do you know what they are? A. Notices from the Department of Public Welfare.

XQ. And did you receive those? A. Yes, I did.

XQ. What did you do when you received them? A. I read them thoroughly several times, and the yellow one with a magnifying glass. After the first reading my eyes became blurred, and it bothered me that I didn't understand some of it because I consider myself a pretty good reader. I read a lot and I am a game technician and it is unusual for me to read something and not be able to understand what it is.

XQ. Do you understand the meaning of all the words on both cards? A. I think in order for me to answer that question with all honesty I would have to read the entire cards. Basically, offhand, everything is okay.

XQ. Do you recall when you received it, when you read it, do you recall whether you had a problem understanding particular words on the card? A. No, sir. I do remember at the deposition that there was one word that I found difficult but when you wrote it out larger the meaning became clearer to me.

[50] XQ. That's right. You have a good memory. Let me ask you this question that is not related to that card which is whether you have ever brought an administrative appeal from a decision of the Department of Welfare relating to your benefits? A. Yes.

XQ. Over the course of time that you and your family have been on public assistance how many appeals can you estimate that you have brought? A. To my recollection I have only had one appeal.

XQ. Just one appeal. I see. Did you take an appeal from this Notice? A. I don't remember.

MR. ALOISI: I would like to have this marked for identification.

(Affidavit of Gill Parker marked Defendants B.)

A. Sometimes my memory is clear and sometimes it is not.

I'm sorry.

XQ. It happens to all of us. I would like you to look at this

and after looking it over can you identify it for us? A. This is an affidavit.

XQ. Whose affidavit is it? A. It says Affidavit of Gill Parker. I assume it is [51] mine.

XQ. How many pages does the document have? A. Three or three and a half pages.

XQ. On the first page, is that your signature? A. Yes, sir.

XQ. Do you recall signing that document? A. Yes, sir.

XQ. When you signed the document did you read it? A. I hope so.

XQ. When you read it did you understand it? A. It is very complicated. I am sure I did.

XQ. So you did understand it when you read it? A. Yes.

XQ. Fully? A. I understood the last page, the last line on the last page very well. I remember that.

. . .

[52] CECILIA JOHNSON (Sworn)

Direct Examination by Mr. Rae

Q. What is your name, please? A. Cecilia Johnson.

Q. Where do you live? A. 38 Bay Street, Springfield.

Q. Do you work? A. Yes, I do, for the Department of Mental Health.

Q. What is your educational background? A. I have a Bachelor's Degree from Springfield College. I have a Bachelor's Degree from American International College. I have an Associate's Degree from Springfield Technical Community College. I have a Certificate from Yale University, Department of Psychiatry, certifying me as a community-based production specialist.

Q. Prior to your present job with the Department of Mental Health where else did you work? [53] A. The Division of Employment Security.

Q. What were your responsibilities with the Division of

Employment Security? A. I was a caseload manager and an employment counselor. As a caseload manager I was responsible for reading Federal regulations from the Department of Labor, interpreting them for staff. I supervised a staff of ten. Also, giving out regulations to the clients that were in the program. As employment counselor I was responsible for on-the-job contracts with various private and public employers.

Q. Have you ever done any community work in the Springfield area? A. Yes, I have.

Q. Can you tell us exactly what that work has been? A. I worked with the Community Health Education Council for Children and Adolescents out of the Mayor's Office. I also directed a program for adolescents.

THE COURT: What is your present title with the Department?

THE WITNESS: MHA 1, Mental Health Assistant 1.

THE COURT: What are your duties?

THE WITNESS: I am assigned to the Springfield Community Mental Health.

[54] Q. Do you have a family? A. I have eight children and six grandchildren.

Q. Who is responsible for the care and supervision of your grandchildren? A. I am.

Q. Does your family presently receive Food Stamps? A. No.

Q. Did your family receive Food Stamps in November and December of 1981? A. Yes.

Q. What, if anything, did you receive from the Welfare Department in early December, 1981? A. On December the 2nd I received a computerized card.

Q. At this time I would like to show you Plaintiffs' Exhibit 1 and ask you if you can identify it? A. Yes. This is the card that I received on December the 2nd.

Q. What did you do when you received that card? A. I read the card with some difficulty. The card said that Food

Stamps were being reduced or terminated. It didn't tell me what was going to happen — one of the two. There was no clear distinction.

Q. After you read the card, what did you do then? A. I called my Social Worker, Barbara Wiley, and she [55] couldn't tell me much on the telephone. I then went to see her.

Ms. JANOS: Objection, your Honor.

THE COURT: You may go on.

A. I then went to see her and she couldn't understand it. She told me it had come from Boston and she didn't know anything about it.

Q. Did you ask her how much your benefits were going to be reduced or whether they were going to be terminated?

A. Yes. She didn't know. She didn't understand the card.

THE COURT: Just as a matter of curiosity, were these benefits for your children or your grandchildren?

THE WITNESS: My two grandchildren.

Q. What did you do then? A. I appealed it.

Q. What, if anything, else did you receive from the Welfare Department in early December? A. Approximately four or five days later I got another notice from the Department of Public Welfare telling me that my Food Stamps were going to be reduced because my income had changed when, in fact, it had not.

Q. Your income had not changed? A. My income had not changed. I am a salaried employee [56] by the State of Massachusetts, the Department of Public Health. My income did not change.

Q. What did you get from the Department of Welfare in December, if anything else? A. Later on, and I don't know how much later on, but a couple of days or a week maybe, I got two cards.

Q. I show you Plaintiffs' Exhibit 2 and ask you if you can identify those? A. These are the cards that I received.

Q. What did you do when you received those two cards?

A. I read them with great difficulty. Page 1 refers you to Page 2 and then it refers you back to Page 1, and then it refers you back to Page 2. I could not understand them. I read them three or four times. My son read them with me. He couldn't understand them either. He said, "Mum, you should do something about this because I don't understand them either."

Q. How old is your son? A. 22.

Q. What kind of educational background does he have?
A. He is a student at Springfield Technical Community College majoring in accounting.

Q. You testified earlier that you appealed the first notice, the blue card. What happened with that appeal? A. I had a hearing.

. . .

[58] Q. Can you describe what happened at your hearing?
A. It is hard to describe what happened at the hearing because the Hearing Officer himself was totally confused about what was going on.

Q. Was there a representative from the Department of Public Welfare at the hearing? A. Barbara Wiley, my Social Worker, was there.

Q. Was she able to explain whether your benefits were being reduced or terminated? A. No, she wasn't.

Q. Did she have with her a copy of the computations or budget sheets pursuant to which your Food Stamp budget was computed? A. She had a lot of — she had some microfiche. It was totally confusing at the hearing because she kept getting up and leaving the room to get different kinds of microfiche.

Then we had to go out to the machine and look at the microfiche. She still couldn't understand what happened. She couldn't explain what happened. The Hearing Officer said — he was totally confused. He couldn't understand what had happened.

Ms. JANOS: Your Honor, I move to strike. It is not responsive.

THE COURT: That will go out. The hearing was [59] a result of an appeal based on the blue card notice that you received and not the orange and black notice?

THE WITNESS: That's correct.

MR. RAE: Your Honor, for a point of clarification, an appeal from the blue card acted as an appeal from the orange and yellow card as well.

THE COURT: All right.

Q. Did you receive a decision from the Department of Welfare after your hearing? A. Yes, I did.

MR. RAE: Your Honor, I would like to have this marked as the plaintiffs' next exhibit.

THE COURT: Very well.

(Decision: Department of Public Welfare marked Plaintiffs' Exhibit 14 and received.)

Q. I would like to show you this and ask you if you can identify it? A. Yes. This is the decision that I received from the Hearing Officer from the appeal.

MR. RAE: At this time, I would like to move this into evidence, your Honor.

THE COURT: It may be admitted.

. . .

Cross Examination by Mr. Aloisi

. . .

[61] XQ. Ms. Johnson, let me ask you with respect to your employment this question: would you describe briefly for us the particular tasks that you find necessary to perform on a day-to-day basis and, what kind of skills do you find it necessary to perform the functions? A. The comprehension of daily living.

XQ. Do you have occasion to do much reading in that job? A. Yes, I do.

XQ. What reading and what kinds of materials? A. Articles having to do with drug and alcohol abuse and prevention, articles having to do with various clarification of judg-

ment skills, things that are needed to function as a human being.

XQ. Thank you. Can you approximate for us how many years [62] you have participated in the Food Stamp program? A. I couldn't give you an accurate answer on how many years.

XQ. An approximation would be fine. A. Well, the Food Stamp Program has only been in existence, I believe, six years or so.

XQ. And you have been participating for six years? A. No, I haven't been participating for six years.

XQ. Approximately how long have you been participating? A. I have had my grandchildren — it will be two years in December.

XQ. Have you ever been on any other forms of public assistance? A. Yes, I have.

XQ. What were they? A. AFDC.

XQ. How long have you participated in that program? A. Off and on for quite a number of years.

XQ. Could you approximate what that means in terms of — you said "quite a number" — A. In terms of numbers?

XQ. Yes. A. Let's see. Off and on for the last fifteen years or so.

XQ. And over that course of time, and prior to the time you [63] received these Notices that are at issue in this case, did you ever have occasion where you had difficulty understanding a Notice that was sent to you by the Welfare Department? A. Some times.

XQ. Do you recall what that difficulty may have been? A. I couldn't.

XQ. Have you ever participated in a lawsuit as a named plaintiff against the Welfare Department before this suit?

A. No.

XQ. What was it about these Notices that prompted you to sue the Department?

MR. HITOV: Objection, your Honor. He is asking the client why she pursued relief. I object. He is asking her why she decided to sue.

THE COURT: Are you a named plaintiff in this case?

THE WITNESS: I think so.

THE COURT: Is she a named plaintiff?

MR. HITOV: Yes, she is, your Honor.

THE COURT: She may answer the question. You must know why you sued. Why are you a named plaintiff?

THE WITNESS: I didn't understand what was going on with the Notices that I was getting.

[64] THE COURT: You didn't understand the Notices? Is that what you are saying?

THE WITNESS: That is correct.

XQ. During the months of October, November and December of last year, were you participating in the Food Stamp Program? A. Yes.

XQ. Were you participating in the AFDC Program? A. My grandchildren were.

XQ. During those three months, October, November and December of 1981, do you recall how many Notices you received from the Welfare Department? A. I couldn't give you an estimate.

XQ. Only these two? A. In that three month period?

XQ. Yes. A. I don't think so but I am not positive. I really don't know.

XQ. Do you recall receiving a Notice with respect to your AFDC benefits? A. Yes.

XQ. Do you recall receiving any other Notices aside from the AFDC Notice and these Food Stamp Notices? A. I got some Notices from the Welfare Department. It is mind boggling. If you are talking about from October, [65] November and December — ?

XQ. Yes. A. Yes. I don't know how many Notices I got.

THE COURT: You what?

THE WITNESS: I don't remember how many Notices I got, your Honor.

THE COURT: All right.

XQ. With respect to the AFDC Notice that you say you received, do you recall having a problem understanding that Notice? A. Yes.

XQ. Let me ask you this: you said before that you in the past had been doing as part of your prior employment some reading of the Federal regulations for the Department of Labor? A. I was caseload manager for the Division of Employment Security, and as such it was under the regulations of the Department of Labor and my job was to read and interpret the regulations.

XQ. Were they a vast array of regulations? A. Yes. I received training from the Division of Employment Security with regard to those regulations.

XQ. You don't recall what they were? A. I couldn't say.

XQ. Did you write memos to other people? [66] A. To my staff, yes.

XQ. Interpreting them? A. Yes. As I said, the Division of Employment Security trained me in reading and interpreting the regulations. I received extensive training in that.

XQ. Did you use the Federal Register at all in that job? A. No.

XQ. What did you use? A. They were regulations that were sent from the Department of Labor to the Division of Employment Security which were then sent to me as they regarded the comprehensive employment training program.

XQ. Were they printed in a booklet? A. No. It was usually a couple of sheets of paper.

MR. ALOISI: I would like to have this marked for identification.

THE COURT: Very well.

(Notice of Eligibility for Recertification marked Defendants Exhibit C.)

XQ. I show you this and ask you to look at it. Can you identify it for us? A. This is a Notice of Eligibility and Recertification.

XQ. Did you receive that? A. Yes, I did.

XQ. What did you do with it when you received it? [67] A. I was told I would receive this at the hearing by the Hearing Officer.

XQ. When you received it what did you do with it? A. I read it.

XQ. Did you understand it when you read it? A. Yes.

XQ. Fully? A. It's very simple.

XQ. Do you know what recertification means? A. I know what it means but it would be hard for me to explain it to you.

XQ. Do you know what happens to you when you get recertified? A. That whatever is happening is going to continue.

XQ. Pardon me? A. What this meant to me was my Food Stamps would continue at least through the month of April.

XQ. When you go through a recertification process what is that like? Can you describe that briefly? A. Going through a recertification process is an application that a Social Worker fills out. She asks you questions and then she says, "Is what you told me true?", and if you say, "Yes," she says, "You sign this", and that's it.

XQ. Then she puts questions to you? A. They are supposed to.

[68] XQ. In your experience that is what happened? A. Yes.

MR. ALOISI: I would like to move the admission of this.

THE COURT: Is there any objection?

MR. RAE: No objection, your Honor.

THE COURT: It may be received in evidence.

(Defendants Exhibit C for Identification received in evidence.)

MR. ALOISI: I would like to have this marked for identification.

(Notice of Food Stamp termination marked Defendants' Exhibit D.)

XQ. Would you look this over and would you identify it if you can? A. I recognize it.

XQ. What is it? A. It is a Notice of Food Stamp Termination.

XQ. Did you receive it? A. Yes, I did.

XQ. What did you do when you received it? A. I did nothing.

XQ. Did you read it? A. Yes, I did.

XQ. When you read it did you understand it? [89] A. Yes, I did.

XQ. Fully? A. Yes.

MR. ALOISI: Your Honor, I would like to move this into evidence.

• • •

(Defendants Exhibit D for identification received in evidence.)

XQ. Ms. Johnson, have you ever brought an administrative appeal from a decision of the Department that related to your benefits? A. I'm sorry. Would you repeat that?

XQ. Have you ever brought an administrative appeal from the Department of Welfare, that is, a decision relating to your benefits? A. Yes, I have.

XQ. Do you recall how many times over the course of years you have brought appeals? A. No, I don't.

XQ. Would it be fair to say that it might be more than five times? A. Possibly. I couldn't really say.

• • •

[70] (Affidavit of Cecelia Johnson marked Defendants' Exhibit E for identification.)

XQ. I ask you to look this over and to identify it if you can. A. I recognize it.

XQ. What is that? A. An affidavit.

XQ. Whose affidavit is it? A. Mine.

XQ. How many pages does the affidavit have? A. Three.

XQ. On Page 3 is that your signature? A. Yes, it is.

XQ. Do you recall signing this? A. Yes, I do.

XQ. When you signed it had you read it? A. Yes, I had.

XQ. When you read it did you understand it fully? A. Yes, I did.

MR. ALOISI: Your Honor, I would like to have that moved into evidence at this time.

• • •

[71] *Redirect Examination by Mr. Rae*

Q. Mr. Aloisi asked you about how many Notices you had received in October, November and December, and your testimony was that you did not recall exactly how many you had received. Would it be your testimony that you received numerous or very few Notices during that period? A. Numerous.

[97] DEPOSITION TESTIMONY OF ALLAN HALEY

"Direct Examination by Mr. Rae

"Q. Can you state your name and address? A. Allan Haley, 30 Woodland Street, Newburyport, Mass.

"Q. Where do you work? A. New York City.

"Q. For whom? A. International Type-Face Corporation, I.T.C.

"Q. Do you commute from Newburyport to New York City? A. I commute from New York twice a week. I work in the city three days. I fly down on Tuesday morning. [98] Tuesday, Wednesday, Thursday, and Friday; back Thursday afternoon early evening.

"Q. What is your position at I.T.C.? A. Director of typographic marketing. Could I elaborate?

"Q. Explain what that is. A. I.T.C. is a company that is basically a brokerage house for type-face designs. We com-

mission type-face designs and sell those type-faces to a group of subscribers and major manufacturers of phototype setters and type imaging equipment. Then we market those type-faces. Every time they sell one of our type-faces, we receive a royalty. I am Director of Marketing Services basically to help our subscribers market type and also to help them educate their customers and internal staff as to the usage of type and how to sell it to them.

"Q. How long have you worked at I.T.C.? A. Just slightly less than a year.

"Q. Where did you work prior to your job at I.T.C.? A. Prior to working for I.T.C., I worked for CompuGraphic Corporation in Wilmington, Mass.

"Q. What was your position? A. My title was Typographic Consultant which meant I had something to do with everything they have to [99] do with typographics. They are the largest manufacturers of phototype setting equipment. I was responsible for the type-faces that they designed. I was responsible for maintaining the design quality of those type-faces, for putting together marketing programs to sell those type-faces to their customers, and for building educational programs for the internal sales staff for CompuGraphic users.

"Q. How long did you work there? A. Ten years.

"Q. Prior to working with CompuGraphic, where did you work? A. I worked for a company on the West Coast, the Letter Graphics International. At the time I left, I was doing alphabet designs, original type-faces for the typography marketplace. I was hired there as a typesetter and letter artist.

"Q. Do you also have other employment while you were working for Letter Graphics? A. While working at Letter Graphics, I was teaching undergraduate classes in UCLA.

"Q. What was your position? A. I was an assistant professor.

"Q. What is your educational background? A. I hold a BA Degree from — it's now called the [100] University of

California at the time it was a state college. It is now a straight university, and I hold a BA in Graphic Communications and MA from UCLA in Typographic Communication.

"Q. What professional organizations do you belong to?

A. I belong to the National Composition Association. I am on the Board of Directors of that particular association, and I am the chairman of the Typographic Aesthetics Committee. It is the largest association that serves people who are in the business of setting type for profit. I am also on the Board of the Friends of the National Printing Museum. I am a member of the American Institution for Graphic Arts. I am a member of the Type Directors Club and also a member of the Society of Typographic Art.

"Q. You have testified that you work approximately three days a week for I.T.C. What do you do with the remainder of your time? A. The remainder of my time is the two days that I am at home. I actually do some work for I.T.C., do a lot of writing for publications for I.T.C., consulting with various companies. Primarily, writing and consulting.

"Q. Have you written any books? [101] A. Funny you should ask. I wrote a book called Photo Typography.

"Q. What is that book about? A. It is a primer of typographic usage for people just coming into the typographic industry who have equipment that sets type in one way or another or it tells them the knowhow to use the equipment. Does not show how to use the tools of type, but shows how to create effective communications. It is a primer of effective communications.

"Q. Have you written any article for trade journals?

A. I write, I guess, you would say extensively, over a hundred articles anyway for journals such as Type World. I am going to forget some.

"Q. Have you written any for Base Line? A. Base Line Magazine.

"Q. Do you do any teaching in your spare time during the period of time that you are not working for ITC? A. I do lecturing for universities, for trade associations, and for industry. I am currently running a class with Pratt in New York City in the fall.

"Q. What kind of things do you conduct in training sessions? [102] A. They are primarily in typographic usage. Entry level: how to communicate with type; how to use the elements of type to create effective communication.

"Q. Are you employed in a consultant capacity with any other firm? A. I am employed as a type safe design consultant for a firm called TSI. It is a British firm.

"Q. Can you tell us where you will be on September 24th of this year? A. Beaune, France.

"Q. What will you be doing there? A. The company that I work for is a member of an association, Atype. It is an international organization of people involved in the typographic industry. We have a major presentation to give at this convention so I am going there for participation and to give a presentation.

"Q. When will that conference end? A. I am hoping to be back from France September 27th. I will be on the airplane September 27th.

"Q. Where will you be on September 28th, do you know? A. Hopefully, we'll be in Boston. It is up for grabs whether I am in Boston or New York. Hopefully, in Boston on the 28th.

"Q. On the 28th you will be in Boston or Newburyport? [103] A. I will be in Newburyport, if it goes to plan. If I am in New York I won't be in Boston."

Mr. HITOV: At this point, your Honor, I would like to have Mr. Haley qualified as an expert.

THE COURT: What is the purpose of the testimony? As an expert he hasn't shown any expertise, obviously, in public benefit programs. Is his expert as to the type of print and whether it can be seen by the naked eye?

Mr. HITOV: And how the print will affect comprehension.

THE COURT: Well, from that point of view, I will allow him as an expert in that area but not as to what was said.

...

Mr. HITOV: "Can you tell us in general terms what typography is?"

A. Typography is the craft of creating communication with letter forms. It grew out of the word type which is actually pieces of metal with letters on the metal type. Working with type to create communication."

...

[104] Mr. HITOV: I believe the question was:

"Q. Are there certain elements or factors that typography concerns itself with? A. Yes. You are basically working with the letters themselves. You are working with type-faces. There are a number of different styles of type-faces, each one being different than the other. Within a type-face you are working setting type, working with things such as line spacing, the amount of white space inserted between lines of type, the lengths of line type, or lines of type, letter spacing, and word spacing. The production quality of the final images is also important. The end result should be a piece of paper with print which is easy to read."

...

[105] "Q. With respect to type sizes, can you tell us why that is significant? A. Type is sized normally in points. A point being equal to one-seventy-second of an inch, or .01383 inches. Generally, there are a number of specific point sizes

that you can deal with starting from six points up to fourteen points for special sizes and then more for larger than that designs. There are larger sizes for special applications or for display purposes. I am [106] assuming we are talking about text sizes. I will limit myself to that. Generally, the smaller the type is, the more difficult it is to read. There are a number of other things that come into play, but generally that's why type size comes into importance. Generally, the ideal size in most textbooks, printed information, is somewhere between 8-or-9-and 11 points.

"Q. Is six point type generally used in the trade? A. Six point type is probably one of the most least used in the trade. It is the smallest commercially available. It is the most difficult to read under normal circumstances and generally the only time six point type is used is for specific applications and then normally the six point type is created to be used at that small size."

* * *

MR. ALOISI: There is an additional point, your [107] Honor, the words "commercially available". We have testimony from this expert earlier that he was doing advertising in the marketplace. As an expert he appears to be an expert in commercial enterprises. There is no background in this record that would indicate he has any familiarity with enterprises such as the one at issue here.

THE COURT: I will allow the word "commercial" to be stricken and the rest may stand.

MR. HITOV: I will continue from Page 13.

"Q. Turning to line lengths, why is line lengths significant? A. The length of line directly affects the readability of the printed page. If the line is too short the sentence structure is often broken. If the line is too long it tends to tire the eye and interferes with referencing the beginning of the line that follows. This is called "doubling": reading the same line twice. If the lines of type are too long the reader will tend to read the same line over and over again.

"Q. Are there generally accepted standards in the field for

line lengths? A. There are a number of guidelines. They all come down to basically that there should be somewhere between seven and eleven words per line. Type-faces [108] which are sans serif in design, those without the little feet at the bottom, generally require shorter line lengths. They are more difficult to read than type-faces which have serifs. Sans serif type-faces should have between seven to nine words per line. Serif type styles should have between nine to eleven words per line.

"Q. Do line lengths vary with respect to the size of the type used? A. If you are working with a very small type-face, six point type, and you have nine words on the line, that line will obviously be shorter than a similar line of nine words set in a type-face which is twice as large. A line length would also be twice as long."

MR. ALOISI: Your Honor, without standing up all the time to object, I would like to say that this entire line of questioning is based upon the expert's view of typography as it relates to type face, and we claim that is not the procedural process that was utilized in this case.

THE COURT: Are you going to tie that in with his knowledge in that area?

MR. HITOV: Absolutely, your Honor. He addresses that very issue.

THE COURT: I will allow him to go forward.

[109] MR. ALOISI: Our position is the way that is tied in it shows what could have been done and I am not sure what could have been done is at issue here.

THE COURT: I will allow you to go forward.

MR. HITOV: "Q. Turning to line spacing, why is the space between the lines significant? A. Space between the lines was at one point referred to as leading. Leading came about from the name where you actually inserted a piece of lead between the lines of type to separate the two pieces or two metal pieces of type. This piece of lead was below the printing surface so it did not print.

"The term 'leading' is not used in current technology so we are getting into the word line space. Line space does two things: one, it creates a horizontal strip of white for the eye to read across. The eye is a very lazy organ. It is pulled down by the force of gravity. On a vertical surface you need every help you can get to get the eye to read across. A horizontal white space gives the eye something to go across.

"As the lines begin to separate you are lessening the chance of 'doubling' and reading that same line over and over again.

"I think it is worth mentioning also what is called solid spacing or no line space really. In effect, and [110] in actuality it means that there is still some spaces between there. In the metal type you had the pieces of metal with the characters on there, and there had to be a shoulder to prevent the characters from meeting. If you put two lines of metal type together, what is called 'set solid', there still would be a white area between those lines.

"Q. Are there generally accepted standards in the field for line spacing? A. Generally. It runs about 20% of the point size used as the guideline, and there can be exceptions but that seems to be the more common guidelines.

"Q. Why is letter spacing important? A. Two reasons. Letter spacing within a word is important in that if you have letter spacing that is too open what the eye tends to do is in one word perhaps read two words, and the person has to figure out whether that is the two words or one word with one large space in there. The opposite of that is if the letters are too close together or, in fact, overlapping. It creates a shape that is unfamiliar to the eye, and the person has to go through some logical search to say, 'Is that indeed an a or an ao combination?' The other thing is when they overlap they create black spots in the text that tends to attract the eye to the darker areas in the [111] block of copy so that the eye sees those rather than reading the block of copy.

"Q. Are there generally accepted standards in the field for

proper letter spacing? A. The only standard you would go by and would be able to put on it is what letter spacing is created by the type designer at the time of type space design.

"Letter spacing will vary depending on the type face and size that you are using. Inherent with computerized phototype setting or type imaging equipment, as the type gets larger, it will automatically increase the letter spacing or add a little space as the type becomes smaller.

"Q. Why is more spacing significant? A. Because we don't read one word at a time. We read in what is called groups of saccadic jumps so that you read a series of three or four words at a time. By adding too much word space you are forcing the reader to read one word, then another word, and then another word, and what is happening is the eye will read the words rather than perceive the information.

"Q. What, if any, is the generally accepted standard in the field with respect to word spacing? A. Standard would be approximately the space of a lower case 'n' in the type face and point size being used.

[112] "There are variables to that. The maximum space would generally never be larger than an 'en' space. In metal type, there were spacing pieces of metal that had spacing relationships and an 'em' was the largest. We are speaking about a point size. A ten point 'em' would be ten points high by ten points wide and an 'en' space would be half of that width, and that would be the maximum. The 'en' would be half the point size.

"Q. Why is type face important? A. A very large number of type faces are specially designed to do a specific task. They are a tool for communication, and you have to use the correct tool to produce the correct type of communication. The same goes for type faces. And again this same analysis would hold true. If you don't use the correct tools in the correct way, the end result will not be what you wanted it to be.

"Q. Why is production quality important? A. When you

get it all said and done you can have the best type face down, the best line length, the best typographer putting it together, and the best layout. It is all for nothing if the black on white paper is not readable because the printed quality is such that it is overprinting and you cannot read the letters. If the [113] letters are filled in for example because of an over inking, if you're running a reverse image, a white image on blackstock, you are running two very bad colors that make it very difficult to read. No matter how much work you do to set up the system to communicate if your production of that system doesn't come out right then you are not going to be able to succeed.

"Q. Is there a generally accepted standard in the trade for production quality? A. I guess the same standard would be that you would have a dark dense image for the letters, that there would be no filling in of what is called counters, and that the edge of the characters will be sharp and well defined.

"Q. Is there any significance to the use of lower case printing, printing in lower case versus upper case? A. A great deal. Lower case typography is more readable than all capital typography. It takes up less space than caps. It is more pleasing to the eye than all caps. Lower case letters grew out of handwriting.

"Capitals grew out of what was essentially signage inscriptions on buildings and monuments built during the Roman Empire. It was first done with a brush and then chiseled afterwards.

"The lower cases sprung out of writing. They are more [114] homogenous.

...

"... What happens they form a word shape. The word d-o-g with the ascender on the d and the descender on the g coming down it forms an outline shape that is stored in the reader's mind and serves as a shape to recognize it when the word is seen later on. All capital words form a rectangle as a visual identifier to the eye."

...

MR. HITOV: "Q. I would like to show you these two cards, and ask you if you can identify those? A. They are the two cards that you sent me to ask me what I thought of the typography presented on them.

"Q. I note on the yellow card there is some pencil notations. Were those made by you? A. Yes, you spoke to me over the phone. You said you would be sending the cards to me and would want the comments so I wrote them down on the side of the card so if in case you caught me at a bad time I would have [115] something to refer to them. It really isn't necessary.

"Q. I would like to have this attached to the deposition as Plaintiff's Exhibit.

...

"Did you analyze these cards with respect to the elements you have just described? A. Yes, I did.

"Q. What did your analysis show?

...

A. Would you like for me to identify them?

"Q. Why don't we go through the elements one by one. A. I looked at the cards and analyzed them in respect to choice of type face, line length, line spacing, word spacing, letter spacing, final production [116] quality, and the layout. The typography layout of the piece itself.

"Q. What is the type size or sizes that are used on these cards? A. Since this really isn't in the true essence a type face, what we need to do is to do a measure and determine how if it was a type face what size it would be. The largest of it, type on this card is six point. The smallest is somewhere around five point seven five, or five and three quarters point.

"Q. How does that compare to the generally accepted standard in the field? A. The six point is one of the smallest type faces that you can get off type imaging equipment. Five point seven five is below that size.

"Now there are specific type faces designed which have a smaller image than this, but they are designed for specific purposes, primarily pharmaceutical labels on pill bottles and that kind of thing. Within the commercial type setting, six point is the smallest you can get."

. . .

[118] MR. HITOV: "Q. What is the generally accepted standard for text generally, text copy? A. Two to four points larger than, somewhere between nine to eleven point type.

"Q. Did you measure the line length of these cards? A. Yes, I did. The line lengths in picas, which is a measure of type. There are twelve points to a pica and six picas to an inch. In pica the shortest line is approximately twenty five picas and the longest line is about thirty nine picas. For this particular point size type, it was two to three times longer than would normally be acceptable. In fact, if you did a word count, just because we did mention that earlier, if you did a word count on these, which I did yesterday before I came, again the line lengths are generally two to three times longer in length than is acceptable.

"Q. What is the line spacing of the cards? A. The line spacing is set solid although there is a white space. There is no additional spacing involved and for specially something that is this small and has a line this long you would want some extra line [119] spacing probably.

"MS. JANOS: For the line on which card? He has two cards in his hand. A. They are both set solid and neither one of them produce better reading ease. You would want to add probably two points of leading to these. They are both set solid.

"Q. What did your analysis show with respect to letter spacing of the cards? A. It was terrible.

"MS. JANOS: Objection to the answer."

MR. ALIOSI: I would object.

THE COURT: The word "terrible" may go out.

MR. HITOV: "A. The letter spacing was inconsistent and overlapping primarily because it was set on a typewriter of one size and reduced to approximately half that size. It's not that typewriter type spaces this bad. At its normal size it spaces satisfactorily but when you reduce that down to small variances you have two characters coming together to each other, and it indeed begins to look like they are going to touch, and if you have a poor printing quality, as you do here, the over-abundance of ink does, in fact, make those two letters appear to touch so that you have letters touching here. You have inconsistent spacing.

[120] "Q. What did your analysis show with respect to the word spacing? A. Word spacing was in most cases an 'en' space and sometimes even larger than that — far above what would normally be accepted as being good typographic quality.

"Q. Do you know exactly how far above the accepted typographic 'en' space? A. Well, if you say the maximum normally considered would be an 'en' space and an 'em' space is twice that and these were a little less than an 'em' space, and in some cases larger.

"Q. What did your analysis show with respect to the use of upper cases versus lower cases? A. Only one side of one card was set in caps and lower.

"Q. Which card was that? A. That is the English version, Page 1. Page 2 of the English version and Pages 1 and 2 of the Spanish would all be set in capital typography.

"Q. What did your analysis show with respect to the production quality of the two cards?"

Mr. Haley noted that — I will repeat the first sentence, which makes no sense, and which he noted in his corrections. He did not recall what he said but it [121] is a nonsensical sentence.

"Page 1 of the Spanish version, where there are obviously

black spaces in the text, where letters come together or appear to touch primarily from an overinking, and Page 2 of the English version, where the copy is quite gray, you are running too gray, one copy is quite gray and the other is quite black, on both of them the edge definition is not as good as it could be or it should be.

"Q. What kind of typeface was used on these two cards? A. Technically it wasn't a type face. It was set on an office or some type of typewriter and it is interesting because I am involved now with a training program for the company I work for. We are training Xerox and other —

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A. It is typewriter output. It is not a type face.

"Q. Is the type itself a serif or a sans? A. It is a sans serif type.

"Q. What, if any, is the significance of that? A. As I mentioned earlier, a sans serif type is more difficult to work with. It is more difficult to make [122] as readable and as legible as a serif type, which is one of the reasons most of the books are in serif type, and we have covered that earlier as to why. Or did we?

"Q. No. Why don't you? A. The reason being that the serif again forms a line for the eye to move across or some sort of crutch to move across horizontally upon the page. Sans serif does not have that benefit. It is difficult to maintain the eye going horizontal and not falling through the cracks between the letters and between the words.

"Q. In analyzing the typography of the notices, did you notice anything with respect to emphasis, an effort to emphasize certain words? A. Yes. There were attempts to emphasize certain words and phrases. The only way you can do this on typewriters, on this particular typewriter, is to underline them rather than setting them in bold face in typography or even in changing type style.

"Q. Does it make a difference from a typographic point of

view whether an item is underlined or set in bold face for purposes of emphasis? A. A bold face will obviously stand out more. If you look at this particular card, it is a mass of gray. If you have a bold face or change of type style in there, the point that you wanted to highlight would stand out [123] more. It would attract the eye to those particular places.

"Q. In analyzing the cards, did you notice anything with respect to the Spanish copy concerning accents? A. The accents were drawn in by hand. Accents are normally type face sensitive. In reading this style these were drawn in by hand and obviously do not go with the type face or the type style in question.

"Q. With respect to text readability, how does the various typographic elements interrelate? A. They interrelate to produce something that in my estimation is a typographic abomination.

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[125] MR. HIRTOV: "Q. Can you explain in more detail how the various elements, as you have analyzed them, with respect to these cards act together? A. You could set these cards in one element that would perhaps not be the optimum or ideal. You could set them in six point type, but that, in fact, that they have been set in six point type, and very long lengths, compound the problem. If you set it in six point type and made the two columns of type, you will make it easier to read and still accomplish the same purposes. The size is very, very small. There are type faces designed which take up no more space than this that are, in fact, larger than this type style and are easier to read.

"They are designed to work in small sizes. There are no additional leadings. With this length of line, you would need to have more additional leading so that it is easier to read.

"The problem is that there are so many things wrong that you kind of go off the typographic scales for guidelines. How much more you need to open this up, I wouldn't know, because the line length is so long and the type face is so small."

* * *

[126] MR. HITOV: "Q. Have you formed an opinion based upon your analysis of these notices of the effect the typographic layout and design of the notices would have on the likelihood that the notices would be read? A. My opinion is that these would be highly unlikely to be read."

* * *

[127] MR. ALOISI: On Page 45, on cross examination, the witness was asked: "Your expertise does not carry yourself into the next step and say that you can determine whether or not someone would read it?"

And his answer was, "That's correct. I could only say that it would seem to be highly unlikely that someone would read it."

THE COURT: I will allow it both ways, one for and one against. I will allow both to stand.

MR. HITOV: "Q. Does typographic layout and design effect reading comprehension? A. Yes, it does in that something that is well laid out typographically is easier to read.

"There is no, to my knowledge, statistical information based on it although comparisons such as the Evelyn Wood Reading School show that the faster you read the more comprehension you have. The bigger the type, the easier it is to read, the faster you are reading, you read the information in groups rather than the extreme opposite, which would be struggling with individual letters and individual words trying to make them out and then put them together into a meaning that makes sense. There is a direct relationship between comprehension and typographic expertise.

[128] "Q. Have you formed an opinion regarding the effect of the typographic layout and design of these cards on a reader's ability to understand the notice, the information in the notice? A. It is my opinion that it would be very difficult for a reader to do this. I had a reason to read these. You sent them to me. I read them two to three times. I struggled

through them to get to the message, myself, to find out what was being said. A lot of it was the typography. It was not easy for me to do.

"Q. Assuming that these notices had to be printed on a standard stock card of the same dimensions as those cards marked as Exhibit 1, could the typography of the notices be improved? A. Of course."

MR. ALOISI: Your Honor, I move to strike. The question asked was: "could the typography of the notices be improved?". His answer was, "Of course".

We are getting into what could have been done.

THE COURT: As I stated earlier, I will allow him to go so far but not beyond that. I will strike the balance.

MR. HITOV: Your Honor, if I might, one of the issues is how would a typographer do it some other way. If the Court decides that the evidence is that one or the [129] other party did not care it seems to me that that is a different consideration.

* * *

[130] MR. HITOV: "Q. What does 74% of standard IBM type equate to in points? A. Nothing.

"Q. Can you explain why? A. IBM typewriters type is a generic term. It is like saying a General Motors automobile. Which IBM type? There are probably 30 to 50 different type styles available from IBM Company for their typesetting equipment. Their typewriters and numbers of type sizes vary from, I believe, nine points up to something like a fourteen point. 74% doesn't relate to anything.

"Q. In your opinion, would it be typographically acceptable to photo reduce standard IBM type of any size? A. What you are doing is —

* * *

"Q. Would it be, in your opinion, typographically [131] acceptable to photo reduce 74% standard IBM type of a ten point size? A. No. Again, you are using a tool in the

way it was not intended. Typewriter type was designed by a person within the constraints of that particular machine to do the best job possible, to have the best possible spacing relationship which is very difficult with the limiting system available on typewriters, and to take that and reduce it by 74 %, you are reducing the effectiveness of that particular designer or engineering by that same percentage.

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"Q. You mentioned that there are some constraints inherent in a typewriter. Could you explain in a more detailed manner what constraints a typewriter imposes on typing?

A. Most typewriters are on mono space and that makes every letter whether lower case i or lower case l and capital m or a number all take up the same amount of space. That inherently means that you have spacing problems and you have design problems in type face designing of the lower case. The lower case is a great deal smaller and it takes up a lot less space than a capital m. Office typewriter type is mono spaced. Every character has the same space. In addition, most [132] typewriters type are very monotoned which in a way detracts from readability in that most type face designs have a thick and thin quality to them to look like serif type design. There are hair lines and bald places in the stock of type face itself. Most typewriters type is a monotone type.

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"Cross Examination by Ms. Janos.

"Mr. Haley, you testified that you did consulting work?

A. Yes.

"XQ. You mentioned one or two different firms. What type of firms do you consult for? What kind of business are they in? A. They are in the business of, they are either firms like Xerox which is in the business of producing type imaging equipment, or type design firms like TSI which is in the business of producing new type face designs.

"XQ. Are there other experts in the field such as yourself

that have the kind of background that you have in this area, and in the Massachusetts area? A. The Massachusetts area. There are a number of photo typesetting manufacturers in the Massachusetts area and in the New England area.

[133] "They each have resident type designers or a number of type designers that are experts in typography. Some corporations would be CompuGraphic, Wang, which has typesetting functions also.

• • •

"XQ. Are you familiar at all with the type of typography that the Department of Public Welfare has for its uses? A. No, I am not.

"XQ. Is the typography, the right word? A. Probably the word you are referring to is [134] type face and type face equipment that they have available to them?

"XQ. Right. A. No, I am not.

"XQ. If you were to consult with a firm and help them set up a typesetting facility what type of machinery and personnel is needed to set that up? A. Number one, I don't help them. I am not that kind of consultant. I would not help them set up a typewriting operation. My field of expertise, although I am familiar with that area, I would not be called a consultant. My field of expertise is in type face design and typography and typography design.

"XQ. From your experience in this area, if you were going to set up the typesetting facility function, a very small system of one person, how much would that be? A. It would probably cost you between twelve and fourteen thousand dollars for the equipment and the type in a processor phototypesetter and processor to process the output from it.

"XQ. How much output would a system like that handle? A. A photo typesetter of that kind would produce approximately 25 to 50 lines per minute of type, on type per a line of type especially being on that is eleven pica, eight point line of type.

[135] "XQ. I guess, I am not sure how to phrase the ques-

tion. All right. But I don't mean output in terms of lines. You could put out, how much work load could it handle? A. I don't know that would be depending on what kind of work you are doing. That's why I brought it down to lines. If you are running books, you can set — I am trying to think here. There are publishing houses that put out several volumes of books a month that are using the same kind of equipment. Maybe that is a good way to put it out.

"XQ. You mentioned the machinery. What type of machinery would we need? A. Direct entry phototypesetter is the generic name for it.

"XQ. You said that cost would be approximately \$15,000? A. Somewhere between eleven and fourteen thousand for a entry level machine.

"XQ. The type of personnel that would be needed to run that machine is called what? A. You can train an office clerk or somebody who has been familiar with office equipment, word processing equipment to operate this equipment and produce type. To produce what would be called fine typography would [136] take somewhat of a lengthy training program. Somebody able to typeset manuals and books is a relatively short training period.

"XQ. When you analyzed these two cards, you ran through the letter and line spacing and the type spacing and those factors in them. In the beginning, you were discussing them both together. Could we just look at them individually for a minute. If you can tell me if there is any differences in type of spacing between the two cards? A. Well, each card has too much space on one side and not enough on the other. The yellow card, Page One, is set in capitals and lower cases which is an improvement over the all cap typography.

"XQ. What is the size of the yellow card, Page One, dated December 26, as far as to the type in the second page of the card? A. It is approximately six point type. It looks smaller because it is approximately the same size within a quarter

point of the other type. I can explain that to you if you want me to, but I would have to draw a picture as to why. The reason here is that they look larger because you are looking at just capital letters. Here the page is taking up by an ascender and descender. What you are looking at is the height of the character.

[137] "XQ. What you are saying is that the size of the type on both of the cards is pretty similar, but the type of page two which is all caps appears to be larger because it is set in all capitals? A. That's correct.

"XQ. You would approximate that as six point type? A. Six point type.

"XQ. You are, in fact, approximating because this is not typeset? A. That's correct.

"XQ. It is a — A. It is a reduction from a typewriter.

"XQ. Reduction? A. That's correct.

"XQ. You discussed before the methods by which one would set up a type face notice or message and the difference between a typewriter which is reduced which is what we have here. Do you have the same flexibility when you are dealing with a typewriter and then reducing as you do with a type face? A. No, you do not.

"XQ. I mean flexibility in terms of word spacing, flexibility in terms of line spacing? A. No.

"XQ. And size? [138] A. Line spacing obviously on typewriters, you can type out a long line or shorter line as you want. Line spacing you can adjust also. The degrees of adjustment is also much more coarse than would be on typesetting machines. Word spacing and letter spacing are not adjustable. They are mechanical aspects of a typewriter. In photo typesetting and other forms of type imaging. Generally, there is a software within the system that inserts more spaces as the type size gets smaller. You are working some master size generally in a phototypesetter. Although, there are deviations to that so that there are more spaces inserted between letters when you enlarge them.

"XQ. It is not in a typewriter? A. Not in a typewriter, that's correct.

"XQ. You were talking about a sans serif? A. Yes.

"XQ. Those are terms that relate to typesetting, is that correct? A. They relate to type styles, yes.

"XQ. Type styles in typesetting relate, do they, to the typewriter? A. Yes, they do, as a matter of fact. They are typewriters that have serifs. Although the function of the serif in the typewriter design is somewhat different [139] in function.

"XQ. Could you explain again the serif? A. It is a little foot on the bottom of the line.

"XQ. You mentioned before that if you got this card in the mail that you would probably not read it because of all the reasons that you discussed before about the spacing and the boldness and the lines. I am not going to go through them all. A. Yes.

"XQ. Is it fair to say that all of those items that you mentioned make it more difficult to read? A. Yes.

"XQ. And more difficult to understand? A. Yes.

"XQ. Your expertise does not carry yourself into the next step and say that you can determine whether or not someone would read it? A. That's correct. I could only say that it would seem to be highly unlikely that someone would read it.

"XQ. Can I ask you, are you on Food Stamps? A. No.

"XQ. Do you receive Food Stamps? A. No.

"XQ. Do you have any sort of public assistance [140] benefits? A. No, I do not.

"XQ. You understand when you are making these statements here that there is a particular population that is receiving this card, that it is not going out to the public at large? A. That's correct, I understand that.

"XQ. In order to compensate for some of the defects that you have stated; that is how many times would you say that I would have to read this in order to begin to overcome all the

capital letters and the length of lines? A. I don't know that. I can't answer that question because it is going to vary from person to person from situation to situation and there are really no —

"XQ. Assuming someone was to read it. A. I can read it a couple of times before I can really get through it and then understand it I can answer for me. I don't know for anyone else.

"XQ. Let me just ask you, Mr. Haley, I brought some samples of other kinds of typing and spacing and sizes just for some comparison. I thought it would help me to tell you the truth and let me just show you. It will probably be interesting for you and not me. A page of today's Globe which is Friday, September 10, 1982. It [141] is an article on the Globe college football. Could you just take a look for me at the paragraph entitled Lehigh versus Maine, and tell me the size of the type that the Globe is using in that. A. That particular size is approximately five and a half point type. It is a Helvetica design that is designed to work in especially small point sizes.

"XQ. That is a certain type of type face? A. That's correct.

"XQ. You mentioned earlier that most type faces are not as small as this one is. A. This is a style of type that has been designed. Most sans serif or very large process typography is set in this particular type style. This particular example of this has some special kinds of things to it so that it can be used at smaller sizes than is normally used. This kind of thing is done in newspaper quite commonly.

"XQ. I would like to mark that for identification as Exhibit 1.

"(Newspaper clip dated September 10, 1982, Page 37, marked as Defendant's Exhibit No. 1.)

"XQ. I want to show you another page of today's Globe which is in the left hand corner here. It is an ad entitled super-

visory second shift. If you could tell me [142] the size type for that? A. For supervisory or the small type?

"XQ. The small type underneath it. A. The small type underneath it is approximately six point type also. If you want exact I can measure.

"XQ. Just approximations. A. It is approximately six point type, probably five and a half because it is in a classified section.

"XQ. Are most of classified sections at five and a half? A. It is, in fact, sizing that used to have a name. It is called an agate which is a five and a half point type. Normally, you would take a six point type design and shorten the descenders and that is so that it will fit on a five and a half point body. They figure that you can't use anything less than that.

"Ms. JANOS: I would like to mark that as Defendant's Exhibit 2.

"(Newspaper clip dated September 10, 1982, Page 57, marked as Defendant's Exhibit No. 2.)

"XQ. One last time. Here is a sample that I am going to show you. It is a copy of an application for Food Stamps recipients fill out in order to be eligible for Food Stamps. I am showing you Page One of that [143] application and there is a paragraph which explains how to fill out the form. Could you take a look at that paragraph, to begin to apply for Food Stamps, and tell me the size that is? A. That is approximately ten point type. You can see at the top the serif in the application for Food Stamps. They have the feet at the bottom of the letter.

"XQ. The words application is in ten point type? I am just using that as — to begin to apply for Food Stamps is approximately ten point type.

"XQ. Could you just briefly explain this. You did testify on how you determine these sizes of the type. Could you explain that again? A. It is difficult without drawing a picture, but yes. Type originally was a letter or a raised image on a piece of

metal. There are six point pieces of the metal and ten points pieces of metal and twelve point piece of metal. You have to have the total ascender and the lower descender of the letter and some room called the shoulder so that during the production process the parts of the characters wouldn't fall off as you are printing. So type sizes would be from, let's say, if I can do this right, if you measured it from the line to the succeeding line you would be able to determine the size.

"XQ. Is ten point type twice as large as five point [144] type? A. Not necessarily.

"XQ. Not necessarily? A. That's correct. It depends on whether it's photo type or not because photo type is proportional. In metal type it is not necessarily so and it complicates the issue further because there are different type faces that may also be classified as ten point type and appear in actuality to be varying sizes from each other.

"XQ. Am I correct in saying that when you look at paragraphs like the one you just looked at of Page One of the Food Stamp application, which is ten point type, it is not necessarily twice as big as the five point type on the other page? A. It is quite possible that it is not. It doesn't look it to me. In fact, that is one of the things that they could have done or will do in a type face design for a small size in the lower case character. They would increase the proportional size of those lower cases so that they are quite large because that's the letter most familiar to the eye for reading so that you get the most area for those characters within the constraints of the point size.

"XQ. You testified a little bit earlier that it would [145] take a couple of hours to lay out the two cards that you reviewed. Did you testify and I don't know if I missed out on the production of the type? A. I did not. You would have to define what you mean by production. If you say the lay out, the typesetting, the processing procedure to printing, prepress operations, and then the printing, I could make an educated

guess and say you could do the whole process in a week or less. If you went to a specialty house you could probably have it turned around over night in quantity. If you didn't, if you weren't paying for the turn around time and you were paying for the method, you could do it in a week.

"XQ. Does it matter how many copies you turn out?
A. Paper is the most expensive part.

"XQ. Let's say take a hypothetical guess of 16,000 of those. How much would you estimate that would cost? A. It would be difficult to say what it would cost. If you were having it printed, if you were having it as the optimal thing to do, less than a thousand dollars.

"XQ. That would not necessarily include the design?
A. In this kind of piece there is no design. There is a design in the application form you gave me. This is a very, very basic thing. If you took this to a printer or if you took it to a typesetting copy [146] manufacturer and said I want to order on this card, the printer would lay it out for you and typeset it. He would do the prepress work and it would be all one price. There would be no design charge. This application would entail a design more complicated.

. . .

"XQ. You were asked about a 74 percent of an IBM standard type, and you said that IBM has a number of type. Let me just show you a piece of what I might call as lawyer's standard type because it is the only ones I see. Let me show you for instance the Answer of Mr. Block to the Plaintiff's Amended Complaint which asks what would I consider a standard IBM type size. Can you approximate and, I know, type point is different than [147] typewriting and you can't make it exactly. A. This is approximately twelve point type. It would be referred to as pica. They are an IBM type. Although, numbers of sizes there are two main types. There are elite and pica. Elite being the smaller of the two. Elite has twelve characters to an inch. Pica has ten characters to an inch and this is the larger of the two.

"XQ. If you were going to try to come up with a measure of what 74 percent of that is, you would first have to translate that size into a twelve point type and then take 74 percent of that? A. Since it isn't type, you say approximately twelve point type in size, it is mathematically 74 percent thereof.

"XQ. If you could just take a look at that orange card for the time being. A. Surely.

"XQ. Assuming you didn't have typesetting facilities available, are you saying that it would be at least better from your perspective not to use all caps, would you use upper and lower cases to make that more pleasing to the eye? A. I am assuming I didn't have typesetting capabilities available to me, I would set it in caps and [148] lower cases and I would set it in two columns on the page so that you have a shorter line length. I would increase the space between the lines of type and if the typewriter has that capability I would restrike over the read carefully areas and any other important areas that you want read.

"XQ. Did you say that you should strike it over? A. Yes. It detracts from the character form but does make the character more bolder. It would be better than what we have here obviously.

"XQ. Have you been a recipient of public benefits?
A. No.

"Redirect Examination by Mr. Rae

"Q. Ms. Janos asked you what type of firms you do consulting work for. Could you tell us what type of things you do for those firms? A. Without mentioning names, I have been involved with preparing training programs for those firms and increasing typographic communications. Increasing effectiveness of this typographic communication so that they can improve the typographical awareness within their ranks so that they can either sell type or manufacture type or talk with people who are in the typographic business.

"Q. Did you say that one of the firms that you are [149] training their personnel with respect to is Xerox? A. That's correct.

"Q. Turning to the Defendant's Exhibit 1 which is the excerpt from the Boston Globe. You testified that the paragraph regarding Lehigh versus Maine was set in Helvetica type style. What are the characteristics of that type that make it particularly suitable for typographic communications at a small type size? A. This particular version of Helvetica appears to have its lower case enlarged more than it would be in a similar design or similar design of Helvetica that is used in nine to eleven point size range. I think it is important to note that we are looking at the second Xerox copy. Looking at a newspaper here. The interior portion of the character of the eye of the lower case e. The interior lower case e has taken full range of design area to it so that it has a lot of area in it so that it does not tend to fill in. It is also designed somewhat condensed so that more characters can be put into a specific, into a given area than a type face that is, say, perhaps would consider normally proportional nor expanded proportionally so that the lower cases are both taller and somewhat more condensed than would be normal reading type face. You can't see it here, but in this particular type size here there are design traits that [150] are created to overcome the inherent poor printing process of setting with type on newspaper print type. Places where two parts of characters are joined are designed such that they have less of a tendency to fill in. Normally, these are designed such that they maintain as much space as they possibly can in a paper.

"Q. Are there similar characteristics of an agate type which are designed specifically for use in classifieds? A. These type face agates are type faces designed specifically for the Bell Telephone Directory. They are created specifically to react well to the printing process that they have to be put into. They use large size letters but use a small point size. They have

design traits for overcoming the printing process they are involved in.

"Q. Is agate type, does that have a serif or not? A. This is the classified, no, it does not.

"Q. Does that effect it in your opinion in this case? A. I guess, you could say it is a business decision. A serif takes up slightly more space. When selling advertising space you want to take up as little space as possible. You want to have as many letters in the same space as possible so there are type faces [151] designed for classifieds that have serif in them. They are not quite as space efficient as serif designs.

"Recross Examination by Ms. Janos:

"XQ. You talked about a kind of consulting work you did and you mentioned one and did not mention a lot of the others. What kind of communications are these companies putting out that they hope to reach or hope to have those communications used? A. One example would be a seminar that I just gave in California. I spoke on a varied number of subject. I spoke and carried on a day's seminar to plant personnel, production and design crews, to give them some insight to training them in typographic communications. They are involved in training programs with brochures with announcements for services, everything that you would think a large multimillion dollar corporation would be involved in. Xerox Corporation is currently involved in producing equipment that sets type electronically so that their goal is to try to replace office typewriters with that at approximately the same cost. What they are doing is trying to determine what type is better and to explain to their internal staff why it is a better product. It is a very large printing system distribution. There are various areas in Xerox that know about type and there are those that are ignorant about type and the [152] educational programs are for those people.

"XQ. Just to boil it down. Your whole science and your

career and your years of studying, are you really getting at making something readable? A. Communication.

"XQ. Making something so that someone will want to read it? A. I started out in the business as graphic designer and then lettering artist. I got into the business in communication. It seems the more that we can help people to communicate with others and have a little bit of something to do with that maybe it makes what I am doing a little bit more worthwhile, so it is communication.

"Redirect Examination by Mr. Rae

"Q. With respect to your opinion concerning typographic acceptability of these two cards, is it your opinion that these are simply not optimal or was it your opinion that these were unacceptable?

. . .

"A. I have already answered the question.

"Q. Could you state your opinion concerning the typographic quality of these notices?

"Ms. JANOS: Objection.

[153] "Q. The impact that has on their readability?

"Ms. JANOS: I think he has already answered it, but go ahead. A. I answered it before, and I said a typographic abomination. I didn't arrive at that opinion by comparing it to typography, the best typographic example, the very best, I compared that to all examples of typography that I would be familiar with in the world and said that this is what is acceptable and what is not. The thing I am looking at is I am holding an Exhibit 1 which is typographically unacceptable in my opinion.

"MR. RAE: I have no further questions.

"Recross Examination by Ms. Janos

"XQ. Mr. Haley, those are not typography, is that correct? A. That's correct.

EXCERPTS FROM TRIAL TRANSCRIPT
OCTOBER 14, 1982

[4]

SUE CONARD

Direct Examination by Mr. Hitov

Q. Would you please state your name for the record?

A. Doctor Sue Conard.

Q. Doctor Conard, what is your educational background?

A. I have a BS in Human Relations and Child Development from Oklahoma State University, a Master's Degree from Harvard University, a Certificate of Advanced Study, and an E.B.D. in Reading and Human Development from Harvard University.

Q. Is that E.B.D. commonly known as a Doctorate? A. Yes, it is.

Q. Under whom did you study at Harvard to get your doctorate? A. My advisor during all my advanced work was Professor Jeanne Chall and she also was the Chair Person at my thesis.

Q. What is Doctor Chall's position at Harvard? A. She is a senior faculty member, a Professor of Education, head of the Reading Department and Director of the Harvard Reading Laboratory.

Q. Doctor Conard, what do you do for a living? A. I am a lecturer on education at the Graduate School of Education, Harvard University, and I teach courses in reading. I am a reading clinician and I maintain a private [5] practice.

I also do consulting and training work for schools, business and industry.

Q. Could you just give us an example perhaps of some of your clients in industry? A. Yes. I have done consulting work for Digital Corporation in revising training manuals. I have done work for Smith, Kline and French, Pharmaceutical Corporation, and I have been a consultant for many years for Ginn & Company, a subsidiary of Xerox.

Q. I believe you mentioned that you did some work for a pharmaceutical company? A. Yes, a colleague and I did work for Smith, Kline & French.

Q. What type of work? A. We were working on package inserts to see if the customers could understand what they were told to do with the medicines.

Q. At what level did they ask you to develop this? A. At about the sixth grade reading level.

Q. What, if any, publications do you have, Doctor Conard? A. My qualifying paper called Standards of Reading Difficulty, Research and Application, and my thesis The Difficulty of Textbooks For the Elementary Grades, a Survey of Teachers and Publishers. I have just [6] recently finished a paper for Ginn called Readability and Readability Formulas. I have co-authored several papers, one called An Analysis of Textbooks In Relation to Declining SAT Scores.

Q. That probably will give the Court some idea of your background in publications.

Do you belong to professional organizations? A. Yes. I belong to Phi Delta Kappa, the National Society for the Study of Education, the International Reading Association, and the American Educational Research Association.

Q. Who is your supervisor? A. The head of the Reading Department, Professor Chall.

Q. Would you describe your working relationship with Professor Chall? A. I think I would describe it as collegial. We both teach courses. We do joint consulting work and also have co-authored several articles.

Q. Have either you or Doctor Chall worked on reading tests? A. Doctor Chall is one of the authors of the Dale-Chall Readability Formula with Edward Dale from Ohio State University.

Q. Have you ever done any work on that? A. We are currently working on a revision of the [7] formula. The first

formula was published in 1948 and a new revision will be published sometime next spring providing we are all here.

...

Ms. JANOS: I will admit that Doctor Conard is eminently qualified as a reading specialist.

Mr. HITOV: Fine, your Honor. We would like to submit Doctor Conard's resume.

THE COURT: You may. The Doctor is to be regarded as an expert in reading.

...

Q. Doctor Conard, have you been asked to analyze anything for the purposes of this lawsuit?

...

[8] A. I was contacted earlier this year by Steve Hitov [9] and asked to do an analysis of two Food Stamp Notices.

Q. Doctor Conard, would you look at these two cards that have been marked Plaintiff's Exhibit 2 and tell me whether you recognize them? A. Yes. These are the cards that were sent to us.

THE COURT: As a preliminary to analyzing the cards themselves, the Notices, were you asked to do any study or were you given any information pertaining to the Food Stamp laws themselves?

THE WITNESS: No.

Q. Who did you work with in doing the study? A. I worked with Jeanne Chall.

Q. What did you analyze these Notices for? A. We did a readability analysis of the Notices to determine their difficulty, and then we used this information to see if they were able to be read and understood by the Food Stamp Recipients.

Q. Would you tell us what a readability study is? A. A readability study is a study that is generally done to determine the difficulty or ease of reading text. It generally involves applying a readability formula, which is the more quantitative aspects of difficulty but it usually involves qualitative aspects as well.

Q. Who would you normally do this type of study for?

A. Readability studies have been done in educational [10] research for quite a number of years. Readability studies are used by educational publishers, and in fact, most State adoption committees require readability information when adopting textbooks.

It is being used more frequently in business and industry in the last few years and also in governmental agencies, such as the Social Security Administration.

Q. Would you explain exactly how reading tests work, what they measure? A. Yes. How much detail would you like?

Q. Just enough so we have some idea. A. Okay. Basically, readability has to do with the difficulty of written text.

The concept of readability, like the concept of intelligence, is quite broad and is generally thought to include all elements and their interactions within a given piece of written material that affects the success that a group of readers have with it.

Readability research goes back to the 1920's. Two major goals are involved in this research. One is to find elements in text that are related to ease or difficulty, and the second goal is to be able to relate this information to readers of known ability. This is where readability formulas come in.

Readability formulas are statistical devices. They [11] are developed by looking at the various elements, usually the words in a passage, sentencing, the number of syllables affixes, this type of thing, and relating it to a set of criterion passages.

These passages must vary in difficulty and have a score assigned to them by an independent measure, using this as a measure of comprehension, and the score usually attached is between 50 and 75%.

Q. Excuse me, Doctor Conard. Would you explain the last part of your answer — 50 and 75% of what? A. Okay. Passages that were usually used to develop readability formulas, the Standard Test Lessons In Reading. These passages

vary in difficulty, and with each of them there is a grade level assigned, and what this grade level means is that this passage has been tested with a group of students, and that the grade level tells what grade level the students were in — who could answer 75% of the questions or three-fourths of the questions.

Readability formulas developed in this way are regression equations, and if you are familiar with regression equations you know they are predictive devices. So readability formulas are intended to predict difficulty. They are not exact measures, and there is a standard error or measurement associated with them.

[12] However, when they are used for what they are intended they are quite reliable tools.

They co-relate highly with reader comprehension. They co-relate with judgments of teachers, librarians, and other people involved in education and they also co-relate quite highly with one another.

Q. I assume there is more than one of these regression analyses available. Could you name a few of them? A. Yes. George Clair, who is quite well known in readability, has defined over 50 such formulas that have been developed since 1920. Probably the better known are the Dale-Chall Formula, which was developed in 1948, the Flesh Reading Formula which was also developed in the same year, and the Fry Readability Graph which was developed, I think, in 1968.

Q. If I heard you correctly, you testified that these tests, among other things, take into account syllable counts and sentences and number of words in a sentence, and that sort of thing?

• • •

[13] A. Readability formulas were standardized on connected prose, and they assume a normal syntactic structure. If, indeed, you took a sentence and turned all the words around you would still get the same readability formula score. What we assume is that people are not going to jumble up words.

Q. Does that aspect enter into your analysis? A. No, it doesn't because all the sentences were in perfect syntactic order.

Q. Which test did you use to analyze the Notices? A. We used the Dale-Chall Formula. The Dale-Chall Formula is based on unfamiliar words, and these words are compared to the Dale list of 3,000 words which are words known and tested with fourth grade students.

The second measurement it uses is average sentence length.

We also use the Fry Graph. The Fry Graph is a newer readability formula, and one that people sometimes prefer because you count the number of syllables in a 100 word passage and again the sentence length, and then you can compute directly on a graph without having to do calculations that the Dale chart requires.

We also use the Flesh Reading Ease Formula.

The Dale-Chall and the Fry Graph define difficulty in terms of reading grade level score, which I think I [14] did not explain quite clearly.

A reading grade level score is not the same as grade placement. It means that students, for example, — if the passage scored 56 level on the Dale-Chall Readability Formula this would mean that students who score at fifth or sixth grade on a standardized reading test can answer approximately 75% of the multiple choice questions on this passage.

THE COURT: Was your analysis limited to fourth grade analysis?

In other words, was it limited strictly to what the words projected for the normal person or did it actually relate to the tone of the sentence itself with relation to —

THE WITNESS: The readability formula analysis, your Honor, is quantitative. That means that the rules have to be applied strictly and in order for it to be meaningful. For example, if you applied a Fry Graph and I applied a Fry Graph for it to be reliable we would have to follow the rules exactly.

What you are speaking of, as I understand it, is more the qualitative aspects of the text we analyzed and, yes, we did that as well.

THE COURT: Were you also aware that some of the recipients themselves were college graduates?

[15] THE WITNESS: Yes.

THE COURT: So if your intelligence quotient, if that was aimed at going to the lower norm, necessarily did not apply to those with the higher education?

THE WITNESS: The reason that the Dale-Chall uses this list of words based on the fourth grade is because it bottoms out at the fourth grade. It only is applicable for material that goes from the fourth grade to 16-plus.

There is a formula called the Space Formula that is applicable only to the first three grades. So that is why this fourth grade list is used.

The other two formulas that we used use syllables rather than words.

Q. Can you relate the results of your tests using those formulas? A. Yes. The two Notices were analyzed. Page 1, the gold card, and Page 2, the orange card, were analyzed. And just briefly, the gold card, the three samples of 100 words were taken for the Dale-Chall analysis.

The raw scores ranged from 7.30 to 8.31 with an average score of 7.87, which is converted to a grade level band of 9 to 10 grade-plus.

The Fry Graph Analysis of these same three samples show an average of 11th grade.

[16] The Flesh Formula does not give a reading grade level. It only gives broad descriptors as easy, very easy, difficult, very difficult.

Card 1 had a score of 50.82 which is, according to Flesh's descriptors, fairly difficult and can also be thought of in terms of a quality magazine.

Card 2, which is the orange card, according to the Dale-

Chall analysis for two samples taken because there were only 283 words, I believe, on that card, show an average of 8.29 raw score which is 11th to 12th grade reading level and a 12th grade on the Fry Graph, and on the Flesh Analysis 49.31, which he interprets as difficult or like an academic journal.

Q. You testified that various things that these tests count. How do these tests co-relate?

. . .

A. The test results for the Fry Graph, which uses syllables, was slightly more difficult than the Dale-Chall Test which uses words, but they were quite similar, 11th and 12th grade.

Q. Those tests, the Dale-Chall, the Fry and the Flesh, are they considered qualitative or quantitative? A. They are definitely quantitative tests.

Q. Did you evaluate these Notices from a qualitative [17] perspective as well? A. Yes.

Q. And what did you conclude? A. We looked at the vocabulary in terms of words that we thought were critical to the meaning of the Notice and we came to the conclusion that about half or less than half were critical.

I think there were only 16 words that we felt were critical to many of the passages.

We also analyzed sentencings in a more subjective way by comparing it to passages of known length that had been related to reading grade level and this, again, compared to about a 10th grade reading level.

I also did a more impressionistic analysis of the card. This is admittedly subjective, but also addresses aspects of readability that everyone believes has to do with difficulty but as yet we don't know how to measure.

One of those is organization. Organization is usually thought of in terms of the organization of a book, the organization of a chapter, a passage, or even a sentence.

In my opinion these Notices were poorly organized. You had to move from one card to the other and information that addressed the same idea was not given in the same paragraph.

. . .

[18] Q. Doctor Conard, you may continue. A. Okay. Another aspect that actually cannot be measured is the presence of many conditional statements.

Research has shown that conditional statements are much more difficult to process, and these cards have a lot of "if then" kind of statements that are very difficult for—I say more difficult than direct statements to process.

Furthermore, there seems to be conflicting information.

THE COURT: Excuse me. Are you talking about the process? Are you talking about to comprehend?

THE WITNESS: I am talking about the way humans process information, which is part of comprehension, yes.

A. (continuing) The next aspect was that conflicting information seemed to me to be given. Both of the cards were talking about reduction in benefits, and yet the last statement says, "This is not an additional reduction in your benefit" and it was not until I checked with Mr. [19] Hitov that I realized that the word that I should have been focusing on was "additional" reduction in benefits.

I think that is very misleading. Let's see what some of the other things are.

Another aspect that I think makes the cards difficult, and this again is subjective, is the use of "from 90 days to this date".

It seems to me that a date could be given rather than having to figure from this time how many days this is.

I think that is more difficult than using the other approach to giving dates.

Finally, and this again is my own opinion, when I first looked at these cards I had to get a magnifying glass to read them.

. . .

Q. Doctor Conard, presuming, therefore, that you used a magnifying glass because you found the type too small —

[20] Ms. JANOS: Objection, your Honor.

THE COURT: Excuse me. I would like to ask an additional question.

Ms. JANOS: I have an objection, your Honor.

THE COURT: Well, there isn't a question before me. The Notice projected a statement somewhere incorporated within that this is either a reduction or a termination of benefits.

Did you analyze that as to its meaning and what it meant to you?

THE WITNESS: That is one of the —

THE COURT: Not what it meant to you but what it might have meant to a recipient receiving such a Notice.

THE WITNESS: I found it very difficult to understand, and in fact that was one of the things that I had to ask Steve about. I think this is the same statement you are speaking of.

I was not sure whether people who were being terminated and people who were being reduced were the same population or not. This was confusing to me, yes.

THE COURT: And it would have been confusing in your opinion to the recipient of the card?

THE WITNESS: Yes, sir.

Q. Doctor Conard, what, if any, co-relation is there [21] between type size and comprehension that you are aware of? A. In the readability one of the raw categories of factors relating to difficulty are physical factors. This has to do with type size, with the amount of white space on the page, with any illustrations, and this type of thing.

The name of the researcher who is generally associated with this kind of work is Myles Tinker. Most of his work was done back in the 1960's.

• • •

Q. Within your field, within your expertise, what is the effect of these various factors on comprehension? A. Well, I

think it is that in order to read and comprehend a passage a person has to be able to see and recognize the words.

Q. How are those affected by type size, if they are at all? A. I am not an expert in typography, and I cannot speak to type size or this type of thing, but I know that I felt that these Notices were very difficult because of the physical attributes.

[22] Q. Have you ever been involved in analyzing texts for professions or whatever? A. Yes.

THE COURT: I am having difficulty following your sentences.

MR. HITOV: I'm sorry, your Honor.

Q. Have you ever been involved in analyzing texts for classrooms or publishers or what-have-you? A. Yes, I have.

Q. And in the course of doing that what is it that you look for? A. You look for all of these broad categories that I talked about. You look for physical and you look for organizational, you look for content and you look at the linguistic aspects.

I have done a lot of work for Ginn & Company, and I know that particularly for primary grades there is a standard that most States set for print size. I don't know what it is.

Q. How do these cards compare to that? A. The print is much smaller.

THE COURT: The print on the Notices that you were studying?

THE WITNESS: Yes, your Honor.

• • •

[23] (Analysis of Food Stamp Notices marked Plaintiffs' 19 for Identification.)

Q. Doctor Conard, what, if anything, have you prepared to set forth the results that you have just been testifying about? A. A report was submitted by Jeanne Chall and myself to you.

Q. At this point I would like to show you something that

has been marked Plaintiff's Exhibit 19 and ask if you recognize it? A. Yes. This has our report.

Mr. HIRSH: I would like to move that it be admitted into evidence, your Honor.

...

[25] (Plaintiffs' 19 for identification received in evidence.)

Q. Doctor Conard, to your knowledge have the Dale-Chall and Fry Tests been used to evaluate the reading difficulty in any other Notices in government assisted programs?

...

A. Yes, I do. I recently read in the Federal Register a report of the Social Security Administration using these two tests to rewrite SSI Notices, I believe, at a sixth grade level.

...

[26] (Pages 42337-42339 of Federal Register marked Plaintiff's 20 for identification.)

Q. Doctor Conard, at this time I would like to show you Plaintiff's Exhibit 20 and ask if you recognize that?

...

A. Yes, these are the pages that I read.

...

[27] Q. That is the Federal Register to which you were referring? A. Yes, it is.

...

Q. Have you done any work to inform yourself of the educational levels of Food Stamp recipients in Massachusetts? A. Yes. I reviewed —

...

[28] THE COURT:

...

. . . . Is all part of that education?

THE WITNESS: Yes, your Honor, I would say it was. One of the goals of a readability study is to define factors related to difficulty and then use this information to match materials thought to be appropriate to particular audiences when their reading ability is known, and so once we do a readability study we try to draw some conclusions about the appropriateness of the information we are working with for particular audiences.

In this case I reviewed a table provided by Doctor Mark Bendick. It is US Bureau of Census Data, Survey of Income and Education, on percentage of Massachusetts families receiving Food Stamps and the years of school completed by the head of household.

I think this is what we were referring to earlier when you said some of these people were people who were college graduates.

...

Q. Doctor Conard, I would like to show you a chart and ask [29] you if you recognize it. A. Yes. This is one of the charts we looked at to determine the reading level of the population.

Q. Doctor, is this the type of data that people who work in your field rely upon in conducting such studies? A. Yes. We oftentimes rely on the Census Data.

Q. What other data, if any, did you acquire from the study? A. Another chart that was compiled by the State of Massachusetts. It recorded the educational level of families receiving Aid to Dependent Children, and the findings were very similar to the ones that we had received from Doctor Bendick.

...

(Mass. Chart book "Aid To Families With Dependent Children marked Plaintiffs' 21 for Identification.)

Q. Doctor Conard, at this point I would like to show you something entitled Plaintiff's Exhibit 21 marked for identification. Do you recognize it?

[30] (Plaintiff's Exhibit 21 for Identification received in evidence.)

Q. Doctor Conard, what did Plaintiff's Exhibit 21, the chart book, tell you? A. It was quite similar, as I said, to the information we had received from Doctor Bendick that about 80% of the families receiving Aid to Dependent Children had graduated [31] from high school, and a little over 50% had one to three years of high school and 18% had an eighth grade education or less.

Q. Doctor, what, if any, co-relation is there between grade level and the information that you just testified about and actual reading level? A. There are some studies that have been done.

* * *

A. There are some studies that have been done that show that reading grade level is generally slightly lower than grade level attained.

Q. Are you aware of any such studies that you relied upon?

A. Particularly for this study we relied on an article by Bendick and Contu in the Social Service Review, and I believe it was in 1978, called Literacy of Welfare Clients.

Q. Is that the type of information that experts in your field normally rely upon? A. Yes, it is.

MR. HITOV: Your Honor, we would like to move that that article be admitted into evidence?

THE COURT: I am not interested in whether she relied upon other experts in the field as I am upon the fact that she may have relied upon it in formulating her [32] conclusions.

Did you, in fact, so rely upon it?

THE WITNESS: Yes, sir, I did.

THE COURT: As well as all the preceding material?

THE WITNESS: Yes.

THE COURT: This is all a basis for the opinion that you rendered?

THE WITNESS: Yes.

THE COURT: On that basis you may have it.

* * *

What, in fact, is that co-relation?

A. For the population that Doctor Bendick and Doctor Condu reviewed studies concerning that the actual reading grade level was much lower than the grade level attained. Generally, a 9th grade school level was attained. As the school level increased the difference between reading level and school level attained became greater.

[33] Q: Based upon all this information we have been discussing and that submitted in the record, have you formed an opinion as to whether or not these Notices were difficult to understand?

* * *

THE WITNESS: Yes.

A. My general conclusions are based upon both Notices. I found that one is written in caps and the other in large and small letters. And generally it is thought that caps are harder to understand than small letters.

So both are difficult some times for different reasons.

* * *

[34] THE COURT: I thought she just did.

A. My opinion is based on both cards and I based it upon the quantitative analysis which showed it to be at high school level plus our quantitative analysis which indicates they were much more difficult than that. I would find it unlikely that high school graduates could read and understand these cards.

Q. Based upon your analysis of the Notice and your information regarding the reading level of Food Stamp recipients in Massachusetts have you formed an opinion as to what percent-

tage of the recipients could be expected to understand this Notice? A. Yes, I have.

Q. What is that opinion? A. I would say that very few could read and understand these Notices.

THE COURT: Did you base it upon a percentage?

THE WITNESS: Yes, I did. Your Honor, let me turn this table over so I can show you. 21% of Massachusetts Food Stamp recipients are elementary school graduates. So I would venture that about 80% would find this hard to understand.

[35] Q. Doctor Conard, how difficult would it be to rewrite this Notice in language that would be easy to understand?

MS. JANOS: Objection, your Honor.

THE COURT: What is the objection?

MS. JANOS: My objection is that what the Department could have done or should have done is not an issue. The difficulty with rewriting it is not before this Court.

THE COURT: Sustained.

MR. HITOV: Your Honor, we would like to make an offer of proof that if the witness had been allowed to answer the question her testimony would be that this should be written at the seventh grade level.

THE COURT: At a what?

MR. HITOV: At a seventh grade level.

THE COURT: What did you say before that?

MR. HITOV: It would be quite easy to rewrite this Notice at a comprehensible level and that there are any number of people in the Boston area who could do so.

• • •

[36] *Cross Examination by Ms. Janos*

• • •

XQ. Doctor, is it a fair summary of the Study of Readability that the purpose of readability is to match readers and books? Is that a fair summary of what readability is? A. I would say partially.

XQ. It was initially designed to match children's textbooks and children, the textbooks with the children who would be reading those textbooks? A. With students that can go anywhere from children through adult learners.

XQ. Is the primary use of readability tests, in fact, for publishers and librarians and educational people so that that match can be done properly or as best as possible?

A. Originally, I think that is what it was used for and indeed I do know that educational publishers used it a great deal.

XQ. You stated in your testimony that there are a number of elements that come into play when you are analyzing a text for purposes of comprehension. Is that correct? A. Yes.

XQ. You stated that some elements are quantitative, that is the sentence length or the words themselves, is that [37] correct? That is one element of reading comprehension or readability? A. Word length is one of the elements included in the formulas, yes.

XQ. Is it true that another element in determining comprehension, and in fact a primary element in determining comprehension is looking at the reader who is actually going to be reading the text or the sample you are examining? A. Yes, absolutely. The reader is also a part of the match between the readability level of the text and who is going to read it, yes.

XQ. Is it fair to say that the reader's purpose in reading and his interest and background in the subject matter must also be considered by anyone using a readability formula? A. Because readability formulas are done on textbooks and because they were standardized on comprehension scores they are mainly used for determining relative difficulty and not for an individual pupil. When it is used that way what you are saying is true.

XQ. That the reader's interest and background, and I am not talking about readability tests as such, but to analyze comprehension, is the reader's background and purpose in reading and interest in the subject matter of primary and [38] foremost importance? A. Readability formulas generally —

XQ. Not the formulas, Doctor Conard. I mean readability for comprehension, determining comprehension as such.
A. Right. The formulas for standardized on 75% comprehension, which is thought to be an instructional level. Now if a student is interested and has a lot of background a more difficult text could be used, yes.

XQ. Doctor Conard, I believe you stated that you studied with Doctor Chall and still, in fact, work with her and that you consider her an expert and an authority in the field of readability, is that correct? A. Yes, that is correct.

XQ. I want to read you a short passage. Would you tell me if you agree with this passage: "To state that a given article on chemistry is comfortable reading for average adults because it has a predictive grade level of 7 to 8 is giving an incomplete picture. For those readers who have no interest or no background in chemistry the article will probably not be comfortable reading and they may get very little meaning from it. For other readers who are interested in chemistry and do considerable reading in the subject the same article will probably be most comfortable reading. This difference in ease of reading and comprehension may exist even though both [39] groups of readers have completed approximately $8\frac{1}{2}$ years of schooling and have the same general reading ability on a standardized reading test."

Ms. JANOS: For the record, that is a passage from a pamphlet entitled Formula For Predicting Readability by Doctor Jeanne Chall.

XQ. Do you agree with that statement? A. Yes, I would agree with it, and I would say that that is why more qualitative aspects are also analyzed.

XQ. You stated earlier that readability tests are statistical devices, they are formulas for determining the level of difficulty of a passage. Is that correct? A. Yes, for predicting difficulty.

XQ. And in doing so you generally analyze a particular

sample, you are taking a sample sometimes of 100 words?
A. Each formula requires different sampling. For example, the Dale-Chall requires approximately 100 samples. The Fry requires exactly 100 samples, and the Small Formula requires 30 consecutive sentences.

XQ. Would you agree that in terms of a proper statistical analysis it would be better to have a larger text from which to sample or be able to take two or three different samples of 100 words apiece? A. We took three samples of 100 words from the text. The formulas themselves are standardized on the various [40] samplings that are generally given with their directions for use.

XQ. So the 100 word sample is the sample you would use for the formula? A. Yes.

XQ. You stated earlier that the Dale-Chall Test is one of the most widely used tests. Is that correct? A. Yes.

XQ. And that is the test that you, in fact, applied or one of the tests that you applied to this particular test? A. Yes.

XQ. You stated earlier that the Dale-Chall Test utilizes in its formula the added sentence length. Is that correct? A. Yes.

XQ. And a list of 3,000 words familiar to fourth graders, is that correct? A. Yes.

XQ. You stated that the test is being revised currently but that the test that you used, in fact, used the list of 3,000 familiar words that were devised by Doctor Chall in 1948? A. By Doctor Dale.

XQ. By Doctor Dale in 1948? A. Yes.

XQ. It is correct, Doctor Conard, that the word "appeal" is [41] not on that list? A. Do you mind if I look?

XQ. No, not at all. A. All right. The word "appeal" is not on the list.

XQ. Is the word "federal" on the list? A. No, it is not.

XQ. Is the word "eligible"? A. No, it is not.

XQ. How about the word "benefits"? A. No, it is not.

XQ. The word "reduction"? A. No, it is not.

XQ. Is the word "television" on that list? A. No.

XQ. Is the word "computer"? A. No, it is not.

XQ. When the test is used are you, in fact, comparing the words from your sample to that list and then you determine what words are unfamiliar on your sample and that goes into determining the grade level? A. Yes, that is correct.

XQ. I believe you also stated that you utilized the Fry Test? A. Yes, we did.

XQ. And the Fry Test uses syllables as opposed to a list of familiar words? [42] A. That is true.

XQ. So that if a word contains more than three or four syllables would that be a word that would be a difficult word according to the Fry Test? A. The Fry Test does not use words with three or more syllables. I think the Small Test does. The Fry Test simply gives us a count of the syllables and the greater the number of syllables the more difficult the passage.

XQ. So, for instance, the word "federal" which has three syllables, would be considered more difficult — on the Small Test it would be considered a difficult word because it has three or four syllables? A. Yes.

XQ. And on the Fry Test its level of difficulty would be measured by the number of syllables that it has? A. Yes.

XQ. And the word "eligibility" again has three syllables? A. Four syllables.

XQ. Four syllables. That is why you are a reading specialist and I am not.

I notice, Doctor, in your analysis you came up with— there were some variations in the standard tests that we used. For instance, in the Dale-Chall Test it came out at a particular reading level and the Fry Test came out at a different reading level. Because of the [43] variations in the tests you would necessarily get different grade level results from different tests or would it be common? A. Because of the way the formulas are developed you generally get or you do not get exactly the same score with different tests.

There also is a standard error of measurement attached with regression equations, generally plus or minus one grade level for readability formulas that cover a wide range, two or three months for the more limited ones like the Space.

XQ. Would it be possible to get a variation in grade level for two or three or four years? A. Yes, it is possible.

XQ. Doctor, if I told you, and keeping in mind the Dale-Chall Test of familiar words, if I told you that a reader was, in fact, familiar with all of the words on the cards that you analyzed, and when I say "familiar" I mean two things. I mean they understood the meaning of each of those words, and I mean they were familiar with the context and the concepts of those words, would that effect your opinion as to the level of difficulty of those passages? A. I think that would be difficult to say because I don't know—are you speaking in general terms?

[44] XQ. If I said to you that a particular reader who read the passages that you analyzed understood all of the words on there, understood what a difficult word might mean like "eligible", "federal". They understood the meaning of the words and they also understood the concepts of the words "appeal", et cetera, would that affect your opinion as to the level of difficulty in a passage for that reader? A. It would not affect my opinion based on the formula because the formula goes strictly by the rules.

XQ. It speaks for itself? A. Yes.

XQ. But in terms of your qualitative analysis, as you called it, would that affect your opinion? A. I think with a qualitative analysis you do consider those things, yes.

XQ. Doctor Conard, did you in doing your analysis look at the Food Stamp application forms filled out by the Massachusetts Food Stamp recipients? A. No, I did not.

XQ. Did you examine the Notice of Recertification for Eligibility that is sent to the Food Stamp recipients? A. No, I did not.

XQ. Did you examine a Notice of Adverse Action, as it is called, received by Food Stamp recipients?

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[45] XQ. Is it fair to say that you did not examine any of the forms that may be seen or are seen by the particular population we are talking about? A. No, I did not, only the Notices that were given to us.

XQ. I think you have stated earlier on direct examination that you are not familiar, as such, with the Massachusetts Food Stamp Program. Is that correct? A. That's correct.

XQ. So that you are not familiar with the procedure that a person goes through in order to become eligible? A. No, I am not.

XQ. The interview process and content of the interview that takes place when someone is on Food Stamps? A. No, I am not.

THE COURT: You are not one of those college graduates that is a recipient of Food Stamps?

[46] THE WITNESS: No, sir, I am sorry, I am not.

XQ. Doctor Conard, do you have Doctor Bendick's study of grade levels that was admitted into evidence?

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XQ. Yes. This is a chart that was annexed to Doctor Bendick's deposition. It is his study of the grade level completed by Massachusetts Food Stamp recipients. Is this the study you used to make your determination of whether that text would be readable by these people? A. Yes.

XQ. You stated, Doctor Conard, that approximately 85% of the Food Stamp population had had a finished grade level of nine or more. Is that correct? A. Would you repeat that?

XQ. When you were making your analysis you utilized Doctor Bendick's report which states that approximately 85% of the Food Stamp population had a reading level or, excuse me, a grade level of nine or more? A. I believe it says 82% completed high school.

• • •

XQ. You stated, Doctor Conard, that you had some difficulty [47] with the size and the height of the Notice. Am I correct, that the difficulty you had with it was the size of the yellow card? A. It was —

XQ. Do you have the cards in front of you? A. Yes, I do. I called them gold and orange, so I will have to see. This one was much more difficult for me to read than this one. I do wear glasses, however.

• • •

THE COURT: Did you also say that you found the card that has the boldface print and that was in caps was more difficult to read than the other one?

THE WITNESS: This has been proved in research studies that it is more difficult for people to read writing in all caps than it is when you use caps and small letters.

THE COURT: Which card contained all caps?

THE WITNESS: The orange card contains all caps.

THE COURT: All right.

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[48] *Redirect Examination by Mr. Hitov*

Q. Who else besides educational publishers use readability studies? A. Readability studies are used by a great number of people.

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A. As I said earlier, in business and in industry, and I think the State of Connecticut is using it on insurance policies.

Q. Ms. Janos called your attention to the chart, Plaintiff's Exhibit 17. I am not sure what that chart does show. Did you mention a number of 82.2%? A. This shows that 82.2% are high school graduates and that 45.8, and this is cumulative, have completed nine through the eleventh grade of high school and 14.8 have completed eight grades.

Would you repeat the question?

Q. No, that's all right. That is what I was getting at. It just left me a little bit confused. If that is correct then more people have graduated from high school.

...

[49] Q. Doctor Conard, if I were to tell you unequivocally that someone understood every word in a given passage would that necessarily mean that that person understood the passage? A. No, it wouldn't.

Q. If I gave you a sample of three, if I told you that three people understood every word in a given passage, could you reliably extrapolate that to a universe of 16,000? A. I would not think so.

Q. However, if you gave me the results of a reading test, the Dale-Chall Test, for example, or the Fry Test, or the Flesh Test, on a given sampling, could you reliably extrapolate that to a universe that size? A. Yes.

...

HARRY KREIDE

[52]

Direct Examination by Mr. Rae

Q. Would you state your name and address, please? A. I am Harry Kreide.

...

Q. Who do you work for? A. I work for the Bureau of Systems Operations which is part of the Office of Management Information Systems, and that is under Administration and Finance for the Commonwealth of Massachusetts.

Q. What is your job? A. Deputy Director.

Q. Deputy Director of the Bureau of Systems Operations? A. Correct.

Q. How long have you been employed in that capacity? A. Since the Bureau was formed in 1979.

Q. Before that where did you work? A. Prior to that the organization that it was merged with, what is now the Bureau of Systems Operations, was called the Office of Management

Systems. That was part of the Department of Public Welfare at that time.

[53] Q. Was that the Division of Public Welfare that dealt with the Department's computer systems? A. I don't understand.

Q. Was the Office of Management Systems a section of the Department of Public Welfare? A. Yes, it was.

Q. Can you describe the relationship between the Bureau of Systems Operations and the Department of Public Welfare? A. The Bureau of Systems Operations provides the systems and operations for nearly all of the automated systems that are brought in the State for the Department of Public Welfare.

Q. And that would include the computer operations for the Department? A. The computer operation and all of the programming.

Q. How large is the Bureau of Systems Operations' staff? A. The current size is approximately 315 people.

Q. How many of those are computer programmers, approximately? A. The number of programmers and analysts combined is in the order of 75 or 80.

Q. Is it safe to assume these computer programmers and analysts are competent? A. Are which?

Q. Are competent. [54] A. Yes.

THE COURT: Are you implying that any employee of the Commonwealth of Massachusetts is not?

MR. RAE: No, I am not. I am implying that they are.

Q. That would be true with respect to the programmers and analysts on your staff during the months of October, November and December of 1981? A. Yes.

Q. What computer, the make and model number, do you use for the majority of your work for the Department of Public Welfare? A. Currently or at that time?

Q. In November and December of 1981. A. Most of the production work was done on the IBM 371/48 at that time.

Q. Has there been a change in the hardware since then?
A. We have added additional equipment since then and most of that work is done currently on the IBM 3033.

Q. Back in November and December did you use the IBM 370, Model 148, to generate Food Stamp authorizations to participate? A. Yes.

Q. Those are generally referred to as ATP's? A. Correct.
[55] Q. Did you use that computer to generate the 902C Report of November 25, 1981? A. Yes.

Q. Did you use that computer to generate the address slips for the general notice of the change in the earned income disregard that went out in late November, 1981? A. Yes.

Q. Does your IBM 370, Model 148, have a full complement of disc and tape drives? A. Yes.

Q. Would you say those are the latest versions of what IBM offers? A. Yes.

Q. What type of printer does that computer have? A. A 3211 and a 1403.

Q. What computer language or languages are used with respect to the Food Stamp Program? A. Most of the programs are written in COBOL.

Q. And that would include the program for generating the address labels? A. Yes.

Q. Would it be fair to say that you have a good working knowledge of the Department of Welfare's computer system and programs as they relate to the Food Stamp Program?

[56] Q. Do you have a good working knowledge of the computer hardware and programs which are used with respect to the reports, the issuance of Notices, and the issuance of Food Stamp ATP's? A. Yes.

Q. Are you familiar with the monthly income reporting system? A. Yes.

Q. Am I correct that the monthly income reporting system is a system whereby certain AFDC households with earned in-

come file monthly reports with the Department of Public Welfare verifying their continuing eligibility for assistance? [57] A. Yes.

Q. In October and November and December of 1981, did the Department of Public Welfare have a separate computer system not operated by the Bureau of Systems Operations into which they entered data collected from the monthly income reports for those households then participating in the monthly income reporting system? A. I am afraid I don't follow you.

Q. In October, November and December of 1981, did the Department of Public Welfare have a separate computer system not operated by the Bureau of Systems Operations? A. That is correct.

Q. It was into that system that the initial data entry for the households participating in the monthly income reporting system on line entry into the computer was done, not into BSO's computer but into the monthly income reporting system? A. For the three pilot offices that were on the system at the time.

Q. For those households that were participating? A. That is correct.

Q. Isn't it true that some of the households in that, the acronym is MIRS, MIRS System, isn't it true that some of those households also received Food Stamps? A. Correct.

[58] Q. Does the MIRS Computer System issue Food Stamp ATP's? A. It does not issue ATP's, no.

Q. That is the computer system which the Bureau of Systems Operations runs that issues ATP's? A. Correct.

Q. Isn't it true that the Bureau of Systems Operations computer gets the raw data upon which the BSO computer relies to generate Food Stamp ATP's from a magnetic tape generated by the MIRS computer to those households which are participating in MIRS and receives Food Stamps?

A. Unless you made a misstatement. It sounds as though you said the BSO computer was feeding the wrong tape to the BSO computer.

Q. I apologize. It would be the MIRS computer generating a magnetic tape which would then fit into the BSO computer? A. That's correct.

Q. So the BSO computer, which issues the Food Stamp authorization to participate, gets the information from the MIRS computer for those households in MIRS? A. Did you say does the BSO computer receive the raw information from the MIRS computer for Food Stamp [59] information?

Q. The raw information which enables the BSO computer to issue Food Stamps to those households. A. If that is what you said, that is correct.

Q. Isn't it true that if there was a bottleneck in the MIRS data entry system the Food Stamp ATP's for those households participating in the MIRS system would be based upon stale data? A. If you are saying if the MIRS system did not update the information on the master file for some reason, that is true. That would be true in any situation. It would issue it on the basis of whatever is the current information.

THE COURT: Is that what you meant by the bottleneck?

MR. RAE: That is correct.

Q. And if the ATP's were issued based upon stale data the likelihood of error in those Food Stamp ATP's would be substantially increased; is that correct? A. Not necessarily.

Q. But the likelihood of error? A. What is your definition of error?

Q. The likelihood that Food Stamp households would be receiving an incorrect amount of Food Stamps. A. If, in fact, there was a failure to update a case [60] on a timely basis and it was, in fact, entitled to a different amount than what it was currently receiving then there would be an error.

THE COURT: What is the relevancy of this line of testimony as to computer output within the Department in the advocacy of the Notices?

MR. RAE: Your Honor, this goes to the likelihood of error in the receipt of benefits which ties in directly to the adequacy of the Notice.

If the Notice does not contain information sufficient for a household to determine whether there is an error, and in fact, there are rampant errors in the issuance then the necessity for a good Notice becomes much more imperative.

THE COURT: All right.

Q. When was the Bureau of Systems Operations asked by the Department of Public Welfare to modify their computer programs to implement the change in the earned income disregard? A. The formal written request for the change was received by us on October 29, 1981. There had been significant discussion of it prior to that.

Q. What specifically did the Department of Public Welfare ask the Bureau of Systems Operations to do with respect to the earned income disregard change? [61] A. Basically, we were asked to modify all of the maintenance programs in which the earned income disregard was used so that it reflected the current amounts and to implement that effective with the December ATP's.

Also, we were asked to issue two different Notices, one to the population which would no longer be eligible because of the 130 percent cap on earned income, and another Notice to those who were either closed or reduced due to the reduction from 20 to 18%.

Q. This case simply involves the earned income disregard for the 130 percent cap? A. Well, it was all part of one change.

Q. Was the Bureau of Systems Operations given a deadline to complete this job? A. It was to be effective with the December ATP's which meant that the Notices would have to

go out by the 20th of November or earlier in order to have adequate notice and the actual change in the amounts to the master file would have to be done by the 23rd of November in order for it to become effective by the cutoff date. That was the cutoff date for that month.

Q. As far as the programming task did the Bureau of Systems Operations have to generate a program or modify an existing program to generate a set of address slips for each household affected by the income disregard change? [62] A. Would you repeat the question?

Q. As part of the programming task did the Bureau of Systems Operations have to generate a program or modify an existing program to generate a set of address slips for each household affected by the earned income disregard change? A. We were asked to make some changes in the existing format used for name and address notices. That was a slight change from what we had before.

Q. Is some programming also required to ensure that the computer generates address slips solely for a discrete set of households, those affected by the earned income disregard change? A. In every case when we generate name and address cards it is almost inevitably a unique situation. There is a certain population that is going to receive notices or a different kind of notice. As I said a moment ago, we sent a different insert to the ones who had been terminated because of the 130 percent cap.

Almost invariably in one of these mass changes there is a uniqueness in one or more of the sub-population of the total.

Q. And that uniqueness requires programming? A. Yes, correct.

Q. Did the Department of Public Welfare ask the Bureau of [63] Systems Operations to include these labels on the Notices or on any other document being sent to the households affected by the earned income disregard change, any individual information about that household change in Food

Stamp benefits amount? A. (inaudible to this reporter)

* * *

Q. Isn't it true that if the Department of Public Welfare had indicated in its formal written request to the Bureau of Systems Operations that it wanted the BSO to program the computer to include on the address label the affected household's old benefit amount, the new benefit amount and the earned income amount BSO would have been able to program the computer to do so without causing any delay in the date by which the earned income disregard changes became operational or in the date by which the Notices informing the affected households of the change were mailed out?

[64] THE COURT: Could you have done it by November 20th or earlier, to get it out to the recipients?

* * *

THE WITNESS: Can we be clear what are the initial things you are asking for, if they had been asked for?

Q. The three additional things would be in the upper right hand corner of the address slip the old benefit amount, [65] the new benefit amount and the household earned income amount? A. The answer is yes.

Q. Thank you.

In December of 1981, did you receive a request from the Department of Public Welfare to program the computer to generate supplemental ATP's to a class of recipients affected by the earned income disregard reinstating the benefits that had been taken away from them in early December? A. Yes.

Q. When did you receive that request? A. The request was not actually received formally by BSO until January 4, 1982. It was dated the 18th of December and it was done on a rush basis. So in effect we were working on it parallel with the processing of the request.

THE COURT: You are saying that you started working toward it before you received the formal request?

THE WITNESS: The request was written on the 18th. I am sure we had a copy of the draft of it at that time.

Q. Would it be fair to say that December 18th was the date of the request for all practical purposes? A. Yes, because on the 19th of December an individual [66] worked overtime specifically on that, so it was clearly in the works then.

Q. When was that programming effort completed? A. On the 28th of December when the supplemental ATP's were sent out.

Q. Isn't it true that supplemental ATP's for the closed cases went out on December 23, 1981? A. That is possible but the work was not completed until December 28th, all the work involved.

Q. As part of the Department of Public Welfare's request to issue the supplemental ATP's did they also ask you to generate a set of address slips for the new Notice that was going to be sent to those households receiving supplemental ATP's? A. Yes.

Q. Did the Department ask you to include on that address slip the household's old benefit amount, the new benefit amount and the amount of earned income? A. No.

• • •

MR. RAE: I would like to make an offer of proof with respect to the last question.

The witness, if allowed to answer, would have testified that it would not have caused any delay in the mailing of the Notices.

THE COURT: All right.

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Cross Examination by Ms. Janos

XQ. Mr. Kreide, you stated that the Bureau of Systems Operations is part of the Office of Administration and Finance; is that correct? A. Correct.

XQ. And you have testified as to what your relationship is

with the Department of Public Welfare. Could you tell us if the Bureau of Systems Operations does systems and [68] computer work for other State agencies? A. We serve approximately 40-odd agencies at the present time. The Department of Public Welfare represents about 50% of our work in fiscal '82.

XQ. What is the bulk of the work you do for the Department of Public Welfare, the day-to-day routine work?

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A. There are three major applications that are supported for the Department of Public Welfare, the vendor payment system, the Medicaid Program. In other words, the child support system, and a variety of recipient systems that provide cash assistance, Food Stamp benefits and the like. The day-to-day thing is — well, typically, there are anywhere from 10 to 20 requests received every week from the Department of Public Welfare to do special reports, to make changes, and to do a variety of things.

XQ. Does BSO generate the checks that go out for the public assistance program on a routine basis as well?

MR. RAE: Objection, your Honor. The checks in public assistance programs have nothing to do with this case.

THE COURT: Well, if the questions are related [69] to the ability of the Department, which is headed by this witness, then I am going to retract my earlier objection and allow the offer of proof as to the abilities to put in the Notice what was asked originally, and if your offer of proof is correct then the answer will stand as evidence. You will be allowed to cross examine on that point if you wish.

MS. JANOS: I would prefer that the witness be asked that question and be allowed to answer.

THE COURT: I will allow it in evidence. Why don't you put the question directly to him?

MS. JANOS: I believe the question stated by Mr. Rae was with respect to the supplemental ATP request on or

around December 18, 1981, would the Bureau of Systems Operations, if they had been requested by the Department, would they have been able to issue a name and address card containing old benefits amounts, and new benefits amounts, and the earned income category when the supplemental ATP's were issued at the end of the month?

. . .

A. Probably we could have, yes.

[70] XQ. Could you tell me, Mr. Kreide, the nature of the changes in more detail that were requested by the Department of you on October 27, 1981? A. The changes for the earned income disregard?

XQ. Yes. A. Basically, it involved modification of all the programs or a significant number of the programs that maintained the master file, the master file that provides benefits not only for Food Stamps but eligibility for Medicaid, for AFDC payments, for General Relief payments, for the Refugee Program. The same master file serves all of those programs. It is a system that has been around for a good many years.

Everytime we go in to make a change we do it with a certain amount of trepidation and care, and even though a change may be small, and this change we made in October and November was not small, but nevertheless it was not a large change. It still required the time and the effort to test everything before we actually allowed the ATP's that were generated for December to be generated.

XQ. When you are given a request by the Department of Public Welfare, can you tell me how, generally, a typical or, in fact, this particular system request was handled from start to finish by the Bureau?

[71] MR. RAE: May we clarify whether he is speaking with respect to this specific request or in general? If it is this specific request I would have no objection.

XQ. If you can, would you relate it to this specific request? A. This particular request — every request that in-

volves a change of a large number of cases is not going to be typical in that it has its own peculiar requirements.

This particular request had been one that we had talked about for a couple of months before, but was part of an effort to delay implementing the change as long as we could because the people who were responsible for this work were fully committed to at least three other major changes that were going on at the time, all of them around the new regulations for AFDC and for Food Stamps.

We were making changes for the earned income cases for AFDC, implementing new regulations for Food Stamps and also putting in an automated system for the elderly and disabled on SSI to receive Food Stamps.

All this was going on during September, October and November, and therefore, it was the wish of the Department of Public Welfare not only because of the impact upon us but also upon them to delay implementing this [72] particular change as long as we could, and so had been discussed during the months of September and October, and finally when it was known that we could not put it off any longer than the December ATP the request was formalized and given to us around the end of October.

Typically, what happens when a request is received — there will be questions that have to be answered. They are not always clear or specific enough as to what the change is.

There may be a lapse of a week to ten days before we have a firm set of instructions that we can give to an analyst or a programmer.

And then typically, depending upon their workload, if it is a small change that should be done in about a period of a week to ten days.

This particular change was not what I would call a small change, not because of the notification that was sent to Food Stamp recipients or the information on that card, but because of the change to the programs that maintain the master file. That is where the significant change occurred.

XQ. What sort of things are you referring to? A. The portion of the program that does the calculation of Food Stamp benefits and validates the amount the worker has put in are correct. That is a portion that [73] had to change.

So continuing on, after the programmer has made his changes in the program or programs, he then has to test that and that will involve anywhere from, for a small change, a week to ten days to test it out and make sure that it is accurate using test data and using a test file in order to verify it.

And then when everyone is satisfied and the Department of Public Welfare is satisfied, and they sign off that it is acceptable then we implement it.

XQ. Did you have any problems during November of 1981 with the availability of computer programmers for this particular program?

* * *

A. We were very tight, yes. We were saturated with the work that was involved in the three major projects that were going on at the time, and it is typically the same individuals that have to make these changes that are familiar with these programs, and so we were not exactly plush.

In fact, we had a number of people that had left the organization between September and October, that were not replaced for some months.

XQ. Were there any particular problems with the individual [74] who was most familiar with the Food Stamp Program? A. I'm afraid I don't follow you.

XQ. Are you familiar with an employee by the name of Mr. Cardella? A. Yes.

XQ. What was Mr. Cardella's position in the Bureau? A. At the time he was suffering from a severe illness which took his life the following year, and he had not shared with us fully what his condition was at the time, but it soon became evident that he was suffering from a terminal illness and was in treatment for it.

XQ. What was his responsibility? A. His responsibility was for the maintenance of what we call the file maintenance programs, the main programs that maintain the master file, the most critical part of the system.

XQ. Was his input necessary to make the changes that had to be done, the file changes that had to be done to implement the changes? A. Yes.

XQ. Do you recall whether or not the bureau had issued for several years what is called a FROM TO Notice on a master change before? A. I don't recall. We had done it before but I am advised by one of our programmers that we have done it [75] in the past for increase situations.

XQ. Have you since been requested by the Department of Public Welfare to reprogram your computer if-you-will to issue FROM TO Notices on mass change cards? A. Yes.

XQ. Can you estimate for us approximately the length of time it took to make the changes that were required in order to issue a FROM TO Notice?

* * *

A. We did have a specific request to generate a TO FROM Notice and by that I mean stating the old benefit amount, and the new benefit amount, as a result of the AFDC cost-of-living increase, which, in turn, caused a decrease in the Food Stamp benefits, and that request was [76] received on June 28th, and completed, done, sent out, effective for September, on August 24th, a lapsed time of almost two months.

I might point out again that the generation of the Notice is not the problem but again it is a mass change and it was all of the changes associated with the master file change that took up the majority of that time.

THE COURT: Were the Notices that are the subject of this inquiry, the orange and yellow cards, printed by your computer?

THE WITNESS: Yes.

THE COURT: How long did it actually take to turn

those out? How long did it take to put the second Notice out after the Court's order?

THE WITNESS: My difficulty in answering that, your Honor, I do not have a way to really separate out that element of time because it was a part of the total change that was done.

The programmer who made the changes to the program that generated that Notice told me that it only took him a few hours to make the change.

THE COURT: As I understand it, the problem was not so much putting out the card as it was making the change in the master program.

THE WITNESS: That's correct.

[77] XQ. Part of the problem was not so much the issuance of the final Notice but the work that led up to it, to the final issuance of the Notice? A. Correct. Unless you frame for me what is the specific mass change that is going to be done and, therefore, the Notice to go with it it is difficult to tell you what the total time is going to be.

The Notice part of it is going to be small. That is not a big thing provided you don't ask me to put more information on the card than there is room for and as long as it is information that is available in the file. That is not a problem.

XQ. In terms of the information that is available on the file and the currentness of the information, how much lead time do you need so the Notice itself would be current or contain current information? A. Again, it would depend upon the nature of the change but even with a small change we insist upon a lead time of at least a month because of the steps we go through that I described earlier.

Even if it is just one change in a statement in the program we need that lead time to test it out because if it is wrong it affects tens of thousands or maybe one hundred thousand cases.

THE COURT: What determines the type of face [78] that the card will contain, the actual print size?

THE WITNESS: If I understand you correctly, your Honor, you are asking me what determines —

THE COURT: The size of the type.

THE WITNESS: The size of the type? Basically, the print part that our printer puts there. It has generally been pica type, meaning it is 10 to the inch and spaced vertically about six to the inch.

XQ. Mr. Kreide, the Bureau computer does not issue these Notices themselves in the sense that they do not type them up, is that correct? A. Those are preprinted inserts that go with the Notice, yes.

XQ. And the Notices that the Bureau prints is a piece of paper or whatever, that comes off the computer? A. Do you want to use this as an example?

XQ. No, that is all right.

MR. RAE: Your Honor, I believe annexed to the deposition of John Cassedy is a copy of the address label which Mr. Kreide has been referring to as the Notice. Mr. Cassedy's deposition is in evidence so that that is available to the Court.

THE COURT: All right.

XQ. The particular card or Notice that the computer issues, is there any flexibility within that computer to change [79] the type and size of the information that is printed out by the computer?

. . .

A. The printer that we used at that time for the Notices that were printed in November and December of 1981, were printed with either the IBM 1403 or the 3211, which has very little flexibility as far as what we call the print font is concerned.

We also have another printer, the IBM 3800, which is a lazer and gives us a lot more flexibility in what we can print.

If somebody said to us, "We want to print not just upper case but lower case and other characters," it would [80] become a task to program that particular application using the 3800 printer.

XQ. I have one final question, Mr. Kreide. On the supplemental ATP's that were issued as a result of this lawsuit last December, did the request that you implemented — was that kind of request that was implemented in the normal course the way you would implement any request from the Department or any agency? A. The one received in December?

XQ. Yes. A. I wouldn't call it normal. It was one of those prize cases, you know, "Get it done. It's got to be done by the end of December. Do whatever you have to do to get it done. Put other work to one side."

XQ. Was it tested the way you would normally test a program change? A. No, hopefully not.

THE COURT: I don't believe I understand the question or the answer. What do you mean by "hopefully not"?

MS. JANOS: I believe that Mr. Kreide earlier testified that when he handled a system request that there is production involved in it and in implementing a change there are certain tests made on the program and on the implementation of the program to see if it is [81] correct and it works.

I believe he testified that that is what the Bureau does in the normal course.

THE WITNESS: We had to shorten that entire time frame in order to get it done by that time and it is not what you like to do normally because you are taking risks.

We could easily have sent out the wrong amounts if we made a mistake and then we would have had to go through another effort to correct whatever error we had made.

...

Redirect Examination by Mr. Rae

Q. You testified concerning master changes. Is it your testimony that the issuance of Notices is a small portion of a master change and it is the changes to the master file that are most significant? A. That is correct.

Q. It is the changes to the master file that take the major

part of the time and it is the changes to the master file also that results in the actual changes in the checks or in Food Stamps in the ATP's? [82] A. More specifically the changes to the programs that are going to affect the master file. Those are the ones that take the time.

Q. Those are different than the programs that would be necessary for a Notice? A. Correct.

Q. The Notice programs are much simpler? A. That's correct.

...

Re cross Examination by Ms. Janos

XQ. If the master file is not changed properly would that affect the information that is printed out on a name and address card, if you were to print it out to the recipients, the specific information on a name and address card? A. Absolutely.

XQ. So it is important that the master file changes be done properly and within enough time? A. Yes.

...

[86]

THOMAS E. CULLERTON

Direct Examination by Ms. Janos

Q. Would you please state your name? A. Thomas E. Cullerton.

Q. What is your address? A. Boston University, School of Education, 605 Commonwealth Avenue, Boston.

Q. What is your position at Boston University, Doctor? A. I am Professor of Education.

Q. Would you state your educational background to the Court? A. Yes. I earned my Bachelor's, Master's and [87] Doctorate at Boston University.

Q. And your degrees are in what field? A. Elementary Education, reading and measurement.

Q. And your Doctorate is in what field? A. In the field of reading and measurement.

Q. Can you give us a brief summary of your professional background? A. I was employed in the Lynn Public Schools as an elementary school teacher. Upon completion of my Doctorate at Boston University I taught at the University of Illinois for three years and I have been at Boston University for 18 years.

Q. What types of positions have you held at Boston University for the last 18 years? A. I came back to Boston University as an Associate Professor. I am now a full Professor. I have been the Chairman of the Division of Reading —

MR. HITOV: Your Honor, we will waive the reading of the qualifications of the doctor.

THE COURT: Very well.

Q. Doctor, you heard the testimony this morning. And I won't ask you to go into detail but can you tell the Court what are reading tests generally or readability tests generally? A. Well, reading tests are available to generally [88] evaluate material on the basis of vocabulary and sentences. Some also evaluate difficulty of material in terms of the number of syllables. They do not take into consideration concepts or ideas.

Q. Doctor Cullerton, I want to show you two cards, which are marked as Plaintiffs' Exhibit 2. There are two pages of them. Can you tell me if you have seen these two cards before? A. Yes, I have.

Q. Did you see them in response to a request that I made of you that you look at them and analyze them? A. Yes.

Q. Did you do a reading analysis of those cards? A. Yes, I did.

Q. Did you do the cards separately or together? A. I did each one separately.

Q. And what standard reading test did you use? A. The Dale-Chall.

Q. Could you tell us what samples you used and what the test results were on Page 2, the orange card, Exhibit 2?

A. On the orange card, the first sample started with "Recent Changes" and ended with "top of this page", a sample of 137 words, and the level of difficulty came out to the 10th Grade.

The second sample started with "you may still" and [89] ended with "of Food Stamps", a sample of 120 words, and the level of difficulty was the 9th Grade.

Q. Did you also analyze the yellow card? A. Yes, I did.

Q. What were your results on the yellow card? A. The first sample began with "if you received" and ended with "changes", a sample of 107 words, and it came out that the level of difficulty was the 10th Grade.

The second sample is "if you did not" and ended with "top of this page", a sample of 116 words, and the difficulty level was the 9th Grade.

The third sample was "a change in" and ended with "to be recertified", a sample of 115 words, and the level of difficulty was the 8th Grade.

Q. Doctor, in your sample for the orange card, your sample #1, in determining the level of difficulty did you have to determine which words were so-called unfamiliar words according to the Dale-Chall Test? A. Yes.

Q. Could you read to the Court that list of words that you determined were unfamiliar according to the Dale-Chall Test?

A. The words were within, division, recent, accordance, federal, deduction, benefits, percent, reduction, portion, determining, eligibility, benefit, results, federal, [90] benefits, reduced, eligible, benefits, terminated, request, disagree, action, requesting, benefits, reinstated, current, and appeal.

Q. Doctor, I note that you read the word "benefits" three or four times? A. Yes.

Q. How does that relate to this matter? A. According to the Dale-Chall each time you encounter a word, if it is not on

the Dale-Chall list of 3,000 familiar words, it is considered unfamiliar.

Q. Doctor, did you also make a list of the words that were unfamiliar on the other card? A. Yes.

Q. Did you also make a list of the unfamiliar words on the three samples on the yellow card? A. Right.

. . .

Q. Doctor, I show you this report. Can you tell me what it is? A. It is a report on the readability of the two cards.

[91] Q. What does the report contain? A. It contains the number of word samples, the number of sentences sampled, the number of unfamiliar words, the average sentence length, the raw score.

Q. And that is for both cards? A. Yes.

MS. JANOS: I would like to offer Doctor Cullerton's results into evidence.

THE COURT: It may be allowed.

(Report of Dr. Cullerton marked Defendant' Exhibit I and received in evidence.)

Q. Did you examine these two cards using any other standard readability tests? A. Yes, I did.

Q. What were those tests that you used? A. I used the Fog Formula.

Q. What does the Fog Formula require you to do? A. You count the number of words, the number of sentences and the number of words of more than three syllables.

Q. What was the result of your test using the Fog Formula? A. On the orange card, the grade level—I did one sample and the grade level came up to 14.4, and on the yellow card it came to 15.2.

Q. Doctor Cullerton, did you use the Fry Test in analyzing [92] these cards? A. I did but I do not have it with me. It was roughly the same but it was higher than the Dale-Chall.

Q. Doctor, can you account for the difference in your test results between the Dale-Chall test and the Fog Test?

A. Yes, the Dale-Chall—the reason I used the Dale-Chall is the formula is the formula that is used by most publishing companies to determine the level of difficulty of the textbooks. It is also the formula that is used by testing companies generally. We believe it is a more accurate formula. It takes longer to administer. The Fog and several other formulas are quicker, and ordinarily a person would use them—not if they were going to be using the material for teaching but just wanted to have a rough estimate.

Q. And that would account for the variations? A. Yes.

Q. In your opinion, Doctor, is one card enough of a sample in order to do an accurate readability test using the formula that you have used? A. In terms of these, I think we have a fairly accurate estimate of two different samples of one card and three of the other card. Ordinarily, when using material to determine readability for something that is going to be used over a long period of time we would want a [93] number of instances and we would want them spread out.

Q. Assume for the moment that the reader of those cards was familiar with all the words that you listed as familiar, and understood the meaning of each of the words, and understood the concept behind each word, would that affect your opinion as to your test results in terms of the grade level? A. Yes. I think one of the things that needs to be done along with the application of the formula is you need a personal judgment in terms of how familiar the people are with the words, how often they have encountered them. It was mentioned earlier that the number of concepts—well, people ordinarily know more than these formulas would indicate.

Basically, we use a list of words that are known by children in the fourth grade, and many of these words would be words that would be common even though they would not be known necessarily by the youngster in the Fourth Grade.

Q. Doctor, I show you Defendant's Exhibit B and it is entitled Affidavit of Gill Parker, and I ask you, Doctor, if you examined any samples from that text? A. Yes, I did.

Q. Would you tell me what test you used and what your results were? [94] A. I used the Dale-Chall Readability Formula, and the sample started with #3, "We have been and it ended with "could appeal". The sample was 106 words. There were 15 sentences. There were 17 words not on the list, and the reading level was about 9th Grade.

Q. Doctor, did you also use the Fog Test in analyzing the readability of that affidavit? A. Yes, I did.

Q. And what were the results of your using the Fog Test? A. It came out to the 14th Grade.

Q. Doctor, I show you Defendant's Exhibit E, The Affidavit of Cecilia Johnson, and I ask you whether you analyzed that affidavit using a standard readability test? A. Yes, I did.

Q. What test did you use? A. I used the Dale-Chall.

Q. Could you give me your results using the Dale-Chall Test? A. Yes. I took three samples. The first one was "I work as a" and ended with "reduced or terminated". It was a sample of 123 words, 7 sentences, and the material placed it at the 9th Grade level.

The second sample was "the Notice went on" and it ended with "had been reduced" There were 117 words, five sentences, and the level of difficulty was the 8th Grade.

[95] The third sample was "I asked Barbara" and it ended with "Every dollar counts".

It was a sample of 114 words, 9 sentences, and the grade level was 8th Grade.

Q. Did you use any other test in examining that affidavit? A. Yes, I did.

Q. What test was that? A. I used the Fog Formula.

I sampled just one sample of 123 words, 7 sentences, and the level of difficulty was 12th Grade.

THE COURT: Were you present when Doctor Conard spoke earlier today?

THE WITNESS: No, I wasn't.

THE COURT: Did you have any trouble reading, and I am not talking about readability, I am talking about reading the actual cards themselves, the type face on them?

THE WITNESS: No. I can tell you that the type face is difficult. Capital letters are harder to understand and harder to read. I think that the kind of paper and the color may be what make it difficult.

THE COURT: Did you have to use a magnifying glass?

THE WITNESS: No, I did not.

Q. Doctor, I have one more question. Why is readability so [96] important when you are looking to determine comprehension? A. Well, if you have to concentrate on trying to read material, you want to concentrate on what you are reading and this does make it difficult.

Q. Is legibility more important in certain types of tests as opposed to other tests or certain kinds of reading? A. I think it is important. I think that youngsters oftentimes are able to adapt to material much more readily than adults. I think ideally we should put material in the hands of people that are easy to read in terms of legibility so they can concentrate on what they are reading.

Q. Does the length of the material have anything to do with legibility? A. Yes, absolutely. Length does and spacing does, all of these things do play a part in legibility. Color of ink, color of paper.

Q. Is legibility more important when you are dealing with a larger reading sample, a book, if-you-will? A. Yes, because of fatigue.

Q. In what respect? A. If the material is hard to read they may, you know, if they don't have to read it, will just give up, whereas if it is material that is relatively short, I find that [97] people are more willing to read it.

THE COURT: Unwilling to read it?

THE WITNESS: No, they are willing—if it is something they need.

THE COURT: What about the subject matter itself? What if the title reads "Reduction or Termination of Benefits"? Wouldn't that strike home?

Wouldn't a person be more willing to read it than not?

THE WITNESS: Yes.

THE COURT: Under those circumstances is your opinion changed as to the readability of the contents within those cards?

THE WITNESS: I think, yes.

THE COURT: In what way?

THE WITNESS: If it is something that is sent to me, and I was going to have to read it, and I thought that it was something that was going to affect me in some way, I would read it.

THE COURT: In other words, if you got a notice from Boston University, for example, that your salary was reduced \$10,000.00, you would read it?

THE WITNESS: Yes, I would.

...

[98] Q. Doctor, if something is not completely understood on the first reading, would a subsequent reading make any difference? A. Yes. Sometimes if material is difficult to read and a person had difficulty reading it oftentimes on the second or the third reading they can begin to fill in with words that may not have expressed concepts before. Yes, I would say so.

...

Cross Examination by Mr. Hitov

XQ. Am I correct that your testimony was that on the yellow or the gold cards there were three samples, on the Dale-Chall? A. On the orange colored card—I did two on the yellow colored card.

XQ. Doctor Cullerton, these tests that you ran were the Fog Test and the Dale-Chall Test, and I believe you also said that you ran the Fry Test? A. The test is close to the Fog.

[99] XQ. Are these quantitative tests or statistical tests? A. They are more statistical. They take into consideration the number of words in the sample, the sentence length, and the number of unfamiliar words in terms of the Dale-Chall.

In terms of the Fog it is the number of words with more than three syllables. It is the number of words but the number of words with more than three syllables.

XQ. If you had three syllables in one word that would be counted? A. Yes.

XQ. If you had six syllables that would be one word, that word would be counted? A. That's correct.

XQ. If you had six one syllable words? A. No.

XQ. What about the Fry Test? A. It is syllables also.

XQ. Are they or are they not related to each individual word? A. I can tell you in one second. The Fry takes into consideration syllables and the average number of sentences in a 100 word sample.

XQ. Are there any other aspects to a readability study or the determination of level that one would put into a test beyond this statistical counting and identifying? [100] A. Yes. I think that one ordinarily would take into consideration—I think the person has to read it and has to look at it to determine, in terms of concepts, whether the material can be understood or not.

XQ. Do you happen to know offhand the reading level of "To be or not to be. That is the question"? A. The First Grade, I think, the statement.

XQ. To be or not to be? A. Yes.

XQ. Would that, therefore, be recommended reading for a First Grader? A. No. That is where judgment has to come into it.

XQ. Exactly how much comprehension, if-you-will, do these statistical concepts, the statistical aspects of these tests, measure? A. None.

XQ. How does one determine the Dale-Chall relates to the First Grade level and the Fry relates to the First Grade level? A. They have established graphs. There is a graph here that is used to determine the reading level of the Fry Formula. The Dale-Chall has several computations that you should take into consideration and I can tell you basically what they are.

You count the number of words and you count the [101] number of sentences. You go through them to determine the number of words that are on the Dale list that are in the sample, and then you determine the average sentence length. Then you determine the Dale score, which is done by dividing the number of words not on the Dale list by the number of words in the sample, and then you multiply by 100.

And then you take the average sentence length and the Dale score and a number called the constant and you total these to come up with the figure that you then use. You use a table to convert to a reading level.

XQ. Did you use these tests, the Dale-Chall, the Fog, the Fry, in your work? A. I have used the Dale-Chall a great deal in determining the reading level of textbooks.

XQ. Why do you use the Dale-Chall? A. That is the formula that they request because they feel it is probably the most accurate.

XQ. I see. Do you feel it is the more accurate test? A. I think the Dale-Chall is probably the most accurate. I do think that you need to take a judgment into consideration.

XQ. When you administer the Dale-Chall test you follow the instructions that comes from Jeanne Chall and Doctor Dale? [102] A. Yes.

XQ. I take it that is because the test is designed to work with those directions and not with other corrections? A. That is correct.

XQ. So that to the extent that one is eliminating words from the Dale-Chall list of unfamiliar words, i.e., therefore adding words, isn't one fooling with the formula? A. I don't understand you, sir.

XQ. If one takes the word list on the Dale-Chall list and adds words to it, I can assume that these words are not familiar words to a given audience? A. Oh, absolutely. The words on the Dale list are words that are determined to be known by children up to a grade four level. I am sure that there are some children at grade four that would not know those words and there are many other words that the children would know that are not on the list.

XQ. Presumably, that is taken into account in the statistical analysis that underlays the Dale-Chall Test? A. That's correct.

XQ. And that is the test that you just testified you believe is probably the most accurate of all the readability formulae? A. That is correct.

XQ. And that underlines the statistical foundation for the [103] test and one would be playing fast and loose to arbitrarily add words or delete words from the Dale-Chall list and that would no longer be the test that that test is based upon? A. That is correct. It is the Dale list.

XQ. You are correct. It is the Dale list.

. . .

[105]

JULES GODES

Direct Examination by Ms. Janos

Q. Would you state your name, please? A. Jules Godes.

Q. And where do you work? A. The Massachusetts Department of Public Welfare, 600 Washington Street, Boston, Mass.

. . .

Q. What is your present position with the Department of Public Welfare? A. I am the Director of the Procedures Unit.

Q. As Director of the Procedures Unit—well, strike that. Prior to being Director of the Procedures Unit what had been your position with the Department? A. I have been in the Department since 1965, starting as a social worker, and I have been a Field Representative at the Regional Office. I have been a Supervisor of Field Representatives in the Regional Office.

I have been a Project Manager for specific projects and Assistant Director for special assistance payments, responsible for policy and procedure. Since 1976, I have [106] been Director of a unit which at various times was responsible for either procedure or policy. There have been a number of shifts within the agency and my function—

THE COURT: Procedure concerning what?

THE WITNESS: The Unit develops procedures used by staff and local offices to carry out the different programs of the Department and how to carry out specific projects. A project we have been involved in is how to implement the Federal Regulations.

Q. How many people are in your Unit? A. 23 people are in the Unit, including myself.

Q. And what are some of the programs? A. Well, the Refugee Resettlement Program, AFDC, Aid to Families with Dependent Children, General Relief, Medical Assistance and Food Stamps.

Q. Can you tell the Court generally how you develop the procedures for a given project? A. It depends upon the nature of a particular project that you have to develop. If it is simply the Department issuing a new policy our responsibilities will be to review that policy, determine the policy, put that policy into different vehicles, such as handbooks or memos to staff.

Depending upon the nature of the policy, it may [107] require implementation or not.

Other items are special projects where you have to do something from beginning to end. It may or may not be related to a policy change.

Involved with that is an analysis of the policy, knowing what the policy is, deciding on the best way and method it will be presented to the field staff, speaking with the staff who are involved in the policy writing, drafting material, circulating material to other units within the Agency.

There are approximately 23 people on our distribution list for comments on material. We receive those comments back and incorporate them into a final document. Then we receive a final sign-off for the document based upon, depending upon the nature of the issue, whether it be our Legal Division, and ultimately, we have to submit it to the Office of Field Operations, which is responsible for the operations of all offices throughout the State.

Then sign-off on it. We then have to schedule the printing of it and ultimate distribution.

Q. Thank you. Can you tell the Court by whom the Food Stamp Program is administered? A. Well, the expense of the benefits are borne by the United States Department of Agriculture. The Department [108] of Public Welfare is the agency in the State responsible for the administration of it.

Within their regulations we have to develop our own regulations. We have to carry out that program, and so forth.

The costs of the benefits are borne 100% by the Federal Government. The costs of administration are shared 50-50 between the State and the Federal Government.

THE COURT: What about the problem of the public welfare employees working strictly in the Food Stamp area? Is their salary picked up by the Federal Government as well?

THE WITNESS: They pay 50 cents on the dollar. The State requests the Legislature for 100% of the cost and are reimbursed by the United States Department of Agriculture.

THE COURT: So, in effect, the Federal Government does pay 100%?

THE WITNESS: No. We pay 50% of the administrative costs, 50% of the salaries of employees who administer the program.

THE COURT: I thought you said you billed the Federal Government 100%?

THE WITNESS: No. We receive 100% of the administrative costs from the Legislature and bill the [109] Federal Government for 50% of it.

THE COURT: All right.

Q. Can you approximate how many households are on Food Stamps in Massachusetts?

MR. RAE: At this time?

MS. JANOS: Yes.

Q. If you can go back to 1981? A. The figures vary. The last figures I saw in the budget request said that during Fiscal Year 1982 the average number of households was about 170,000, and they expected a similar size case load during Fiscal 1983, that is, the State Fiscal Year.

Q. Can you approximate the number of households on Food Stamps that have what is called earned income?

A. Again, from the same document, approximately 12% of the total number of Food Stamp households have earnings.

Q. What is earned income? A. Earned income is basically money which is received for performing a service as compared with unearned income which may have been for services performed a long time ago. Social Security would be unearned income. Welfare benefits would be unearned income.

Q. Can you tell the Court briefly how the Department determines whether or not a household is eligible for [110] Food Stamps, in other words, the criteria for eligibility?

...

A. There are two basic kinds of households that receive Food Stamps: public assistance households and non-public assistance households—households in which all members of the household—all people receiving Food Stamps are in receipt of AFDC or General Relief. Non-public assistance households consist of at least one member who is not in receipt of those benefits.

The non-public assistance households have to file an application for assistance and are interviewed by a worker, generally in the office, but if circumstances require it that interview will take place in their home.

During that interview process the worker is expected to inform the recipient about the program and their [111] rights and responsibilities. During the interview the worker and recipient complete the application form which asks information necessary to make a determination of eligibility. The factors that would have to be considered are such things as who in the household is receiving benefits, for whom are the benefits being requested, what is their income and what are their assets, how much money do they have in the bank, and also whether they have a new car or any property, etc cetera.

They are then asked to sign the form. The worker generally goes back to the office or to her desk, makes a decision on eligibility, determines their benefit level and generates a notice to the recipient telling him of the decision, as to whether their case has been approved or denied.

They also give them at the time a form which the recipient is expected to complete. If there are changes in income of more than \$25.00, changes in the household, changes in shelter expenses—these are all factors.

THE COURT: What you are saying is that of the 170,000 households in fiscal 1982 12% with earned income would be classified as non-public assistance households?

THE WITNESS: No. Non-public assistance households are approximately—of the 170,000, [112] approximately 70,000. It varies.

THE COURT: Of that amount 12% with earned income would be classified by that definition?

THE WITNESS: That 12% is of the entire 170,000. I don't know whether the 12% applies evenly.

THE COURT: Are you saying that you can have earned income and still be regarded as a public assistance household?

THE WITNESS: We have recipients who are on AFDC, who are working, and who are receiving both AFDC and Food Stamps.

THE COURT: All right.

Q. I show you an application for Food Stamps document and ask you if that is the application form to which you were just referring? A. Yes. This appears to be the application form. I believe it has been revised since January, 1980, but this is similar to the document we now use.

Q. I now ask you to look at a document entitled Change Report Form and ask you to describe what this is. A. This is the form that is given out at the time of the initial application. It is a form that the recipients are to report any changes in their circumstances of their household on.

Q. I show you this Notice of Eligibility Initial and [113] Recertification and I ask you to identify that document. A. This is a letter that the Department sends out to all NPA households at the point of their application or when they are recertified telling them the status of their case, the status of their application, and whether they have been approved or denied.

Q. Would you explain what certification means or recertification? A. Certification is the process of determining eligibility and is the process of obtaining verification and then making a judgment as to how much people should get if they are entitled to anything.

Q. What is the process? A. If they are a NPA household and they have been on the computer file approximately 45 days prior to the end of their defined certification NPA

households are given a particular period of eligibility.

Q. What is that period? A. It will vary anywhere from 1 to 12 months. The maximum is 12 months. The length of certification will depend upon the nature of the household. If it is a stable household they can get as many as 12 months. If it is a household that is subject to change, the loss of a job or starting back to work, for example, or they have been laid off but expect to go back to work, [114] the certification period would be as little as one month. The most they can get, it informs them, is 45 days prior to the end of their certification period, which right now is the last day of the calendar month, it informs them of the fact that the certification period is ending, and if they wish to continue to receive benefits they must come in and be recertified.

Q. What happens at the recertification? A. It is basically treated as if it was a new application. The process begins anew. They have to fill out a new ASPI application form. They have to submit the necessary documents and answer the necessary questions, and then the Department notifies them what the result of their action is.

Ms. JANOS: I would like to offer into evidence the application form, the Change Report Form and the Notice of Eligibility Form, to which the witness has referred.

. . .

[115-118] Q. Do you know what the Omnibus Reconciliation Act is? A. I do.

[119] Q. Do you know of the changes in the Omnibus Reconciliation Act that were required in the Food Stamp Program and what those changes were?

. . .

THE WITNESS: The Omnibus Reconciliation Act of 1981 required major changes in the Department's regulations and as such required major activities of staff in my unit in both the AFDC and the Food Stamp programs.

THE COURT: With particularity to the Food Stamp Program, how did it change your unit?

THE WITNESS: It changed the regulations that [120] ultimately generated the Notice which ultimately generated this court suit.

THE COURT: Did it change the Notice?

THE WITNESS: It required the issuance of a Notice. The Omnibus Reconciliation Act and the Food Stamp Program required the implementation of a number of new regulations, two of which we implemented utilizing the computer to calculate new benefit levels for recipients of Food Stamps, and we had to notify the recipients of that change, and that is why I am in Springfield today.

...

[122] THE COURT: I would be interested to know the [123] time span in which you were compelled to operate. How many employees were under your supervision?

THE WITNESS: At this point in time there were 22 under my supervision.

THE COURT: At that point in time, and I am talking about the fall of 1981.

THE WITNESS: Somewhat less than that, your Honor. I would say the number was around 18.

THE COURT: What was the time span of the edict before you? When did the Notices have to go out?

When did the recipients have to be informed of their benefits and their rights, their reductions, or whatever?

THE WITNESS: We received Federal regulations in September of 1981 informing us of changes that were to take place on October 1, 1981.

Those regulations also allowed the Department to request a waiver of the implementation, the time frame of those.

Towards the end of September the Agency requested a waiver.

...

I was involved in the waiver [124] process request and drafted the memos for the Deputy Commissioner at the time. We requested the Federal government waiver until January 1st for implementation for two factors—because of the fact that items having to do with AFDC as a result of the Omnibus Reconciliation Act and as a result of the fact that the Department was involved in a cash-in for SSI recipients who became eligible for Food Stamps on October 1, 1981.

The Federal government said no to that initial waiver request and told us that we had to implement it.

...

The Federal government in writing requested us or told us that we would have to implement it on November 1st. This was during the month of October.

We then followed it up with further correspondence to show the benefit of not doing it on November 1st and agreed that we would implement all portions of the Omnibus Reconciliation Act on December 1, 1981.

...

Q. Would you describe what it is that you and your Department did in order to implement the changes that were required?

[125] MR. RAE: Your Honor, I object again. Are we talking just about Food Stamp changes?

THE COURT: Yes, Food Stamps.

A. The first step in the process when the date was finally decided was to decide how we were going to do it, whether it was going to be a mass change or we were going to ask the computer to do it, whether we were going to have an individual case-by-case review, and the decision was to have the computer do it.

We had to analyze the policy. The first correspondence to the field staff was to tell them about the impending changes because any negative changes that were going to take place

after a particular date during the month of November had to be calculated using the new method.

A Systems Request had to be submitted, which was submitted at the end of October, requesting a readjustment of the system to do the new calculation, to put the new 130% limit on—the new 18% income reduction on.

We then had to explain that we needed Notices sent out to each of the affected cases.

We had to develop procedures which would describe those changes and tell them what their responsibility was in it.

[126] We had to prepare that material and distribute it. Staff members had to review the computer output, the involvement and testing of the data as it went into the file, and ultimately the production of the material for distribution to the field offices.

Q. I show you a series of what is entitled AP Memos and ask if you can tell the Court what those are. A. This is a memo that is sent to all case worker staff or financial assistance staff giving them specific instructions around the project. The AP/ADM are memoranda that are sent to the administrative staff through the level of supervisor, telling them what their responsibilities are.

Do you want me to describe each one of the five memos?

Q. No. But were those AP Memos that went out to the staff specifically relating to this particular project? A. The five AP Memos that I have in front of me were issued relating to the 12-1 changes and the intervention in this particular court suit and the action we had to take in regard to that.

Q. Did you or someone on your staff write those memos? A. Yes.

Q. Do you have there what is called an AP/ADM Memo? A. I have in front of me three AP/ADM Memos which were [127] also written in regard to this particular effort for the December 1st implementation and the reimplementation as a result of the actions taken in this court suit.

Q. I show you a document entitled State Letter No. 559 and ask if you can identify what that is? A. This is the State letter which transmits the policy in accordance with Chapter 30A of the Massachusetts General Laws regarding the Omnibus Reconciliation Act as it relates to Food Stamp holders.

...

Q. Mr. Codes, I show you what has been marked Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 2 and ask you if you recognize them? A. Do you want me to describe them?

[128] Q. No. A. Yes, I recognize them.

Q. Can you tell the Court as to Exhibit 1, the November, 1981, Notice, who wrote that Notice? A. The specific individual?

Q. Yes. A. William Christie.

Q. Is he in your Department? A. Yes.

Q. Can you tell the Court how that particular Notice was produced or run off if-you-will? A. The process we use is the secretary types the Notice on either a piece of paper or on a card and it is sent down to our print shop which uses offset printing to do the process.

THE COURT: Whose decision was it to use a card rather than a letter?

THE WITNESS: When we do mass mailings, your Honor, the system that we use is the computer produces an address card with the name and address of the recipient and a return address on it which is then put with whatever information we are sending and it is inserted in an envelope.

My understanding is we do not have equipment capable of inserting letters.

[129] THE COURT: Are you saying that all the Notices that go out from your Department go by way of cards?

THE WITNESS: All mass mailing Notices where we ask the system to generate a Notice is produced on card stock and approximately this size. It has to be very close to this size.

THE COURT: Whose decision was it to actually compose the form contained within the card, the actual composition?

THE WITNESS: The words?

THE COURT: Yes.

THE WITNESS: A staff member under my direction had to develop the Notice to communicate the change to the recipient, and did it utilizing previous Notices—cut and paste. The language regarding appeal hearings is basically the same language that we use on all similar Notices.

THE COURT: When the first Notice was enjoined by the Court who changed the composition of the verbiage contained within the second Notice that went out?

THE WITNESS: It was generally done by the Department's Legal Division.

THE COURT: Whose decision was it to change the [130] form of the caps that were employed?

THE WITNESS: Probably my secretary.

THE COURT: All right.

THE WITNESS: It was simply a typing issue that if—if items are going to be reduced they generally employ caps because it was felt that reduction would show off better.

Q. Were the changes in format any different on the first and second notices as it related to the method of the unearned income change? A. Between Change 2 of the December 26th Notice?

Q. Yes. A. No. Just to accommodate the fact that we were referring back to the first part.

Q. So that Page 2 of the second Notice is similar to the first Notice that went out? A. Very similar.

Q. In drafting Page 1 of that Notice what were you trying to communicate to the recipients? A. The attempt was to show that we were complying with the Court order in restoring benefits and how we were going to restore benefits and that, in fact, in January their benefits were again going to be reduced, and the fact that they did not have to appeal.

We tried to put in the fact that if they had [131] experienced a change of income of more than \$25.00 or less than \$25.00 it might be to their advantage to let us know, that they did not have to reappeal.

It was a matter of saying that—the first page was attempting to get a lot of information across to the recipient.

Q. Is that the kind of information that you normally send out in a mass change Notice? A. No. The information we send out in a mass change Notice is on—what is it? Plaintiffs' Exhibit 1 or what is Page 2 of #2.

Q. Does the format of the November Notice and Page 2 of the December Notice differ in any respects from the format that the Department has used in the past for mass change Notices?

. . .

A. No. They are basically the same format we have always used. It may vary slightly but not greatly.

Q. Approximately how many people received the November Notice? A. Approximately 19,000.

Q. Approximately how many people received the December Notice? [132] A. Something in excess of 16,000.

Q. Can you explain the difference between the two figures? A. The November Notice was sent to everyone who was on the file at the time of the select and the run.

A number of those cases that were on the file in November were up for recertification as of the end of November, and did not recertify or were determined ineligible for benefits in December, and when we went to run the same population in December those cases had already been terminated from the file and did not appear.

Q. Can you tell us what the 902 Report consists of? A. The 902 Report is a report produced by the computer—after it has done a series of calculations on cases—and it shows what has happened to the particular cases as a result of the calculations.

It is a positive action. Something has happened and it worked.

Whatever we wanted to do it happened and it appears on the 902.

Q. Are there different segments to the 902 Report? A. In December, 1981, or actually November, the report was produced in three parts.

Q. What were those parts? A. There was an error code A which was for cases that were terminated because their income exceeded 130% of the [133] standard, which is a new regulation.

There was the B report, which were cases which were recalculated and which experienced no change.

The third group was the cases with earned income or which experienced a change as a result of a recalculation.

Q. Did your unit have occasion to go through this run at some point and determine whether or not there were any errors on the 902 C Report? A. It was discovered after the fact, that there were cases that appeared on the 902 Report that were in error. There were household sizes 1 and 2 which were reduced below \$10.00, which is the minimum amount of benefits that a family that size should get.

There were cases that were given a bonus level of 1, 3 or \$5.00 and they are not able to obtain stamps in those figures. They should have been 2, 4 and 6.

There were other errors found on that report.

Q. Do you know the reason for those errors? A. No, I do not.

Q. What attempt has the Department made, do you know, to correct those errors? A. The Department went back in, when we discovered it, and requested, and had those errors corrected by the computer.

[134] Q. What effect did that have on the recipient's case file? A. They should not have received any loss of benefits as a result of it.

Q. How does the Department do that? What method is there to correct an error that has been made in a file? A. At anytime the Department determines that there is an under-issuance there is a loss benefit policy—

Q. A what? A. An under-issuance—they have not received the total benefits they are entitled to. There is a loss benefit policy which requires the Department to go back 12 months and recalculate what their benefits should have been and subtract from that what they were actually receiving and to pay any difference to the recipient.

Q. If during the course of the recertification process an error has been discovered how is that handled? A. If the worker determines that it was for a previous period they should apply the loss benefit policy.

Q. What does that mean? A. You give them the benefits that they lost during the period of time that preceded the recertification.

Q. Of the approximately 16,000 people who received the December Notice do you know approximately how many people as of now have not been either recertified or had their case closed? [135] A. There are 193 remaining.

THE COURT: 193?

THE WITNESS: 193 households.

THE COURT: You said people. These are households?

THE WITNESS: That is correct.

Q. Of the 16,000 households that received the Notice? A. Of the 16,000 households there are 193 now that have not had a recertification. Or have not been closed.

Q. I show you a small orange card and ask if you can identify that? A. It is a language card that the Department now sends out with every termination—end of certification notice which tells the recipient in different languages that this is an important notice and to have the attached card translated.

Q. Did the Department use that Notice last November and December? A. No, it did not.

Q. Is the Department now using that Notice? A. The Department now uses this Notice at any time we do a Notice change.

. . .

[136] THE COURT: Is there any Statute of Limitations? What I really mean is is there any cut-off period? Is there any cut-off period on which Massachusetts can reclaim from the Federal government benefits that it has found that recipients have been deserving of but have not been given?

THE WITNESS: There is a limit of one year in the Federal regulation in which we can restore lost benefits—one year preceding the discovery of that loss.

THE COURT: I am not tipping my hat to indicate how I feel. What if this Court should decide that the second Notice is, in fact, illegal and orders new Notices to go out to 16,000 households? Would they then be entitled to lost benefits between last November and December and the time in which those Notices go out? And then Massachusetts would be reimbursed by the Federal government?

THE WITNESS: I cannot answer to whether the Federal government would reimburse us.

In fact, we would issue stamps that would be out of the Federal Treasury, so-to-speak. The Federal government could bill us for those stamps. That I don't know, [137] your Honor.

Can I interject?

THE COURT: Yes.

THE WITNESS: When I say that there are 193 cases that have not had a change in certification period or have not been closed, there has been some intervening action in each one of the other 16,000-plus cases that has caused a recalculation of the household's benefits.

THE COURT: I understand that. What of the 16,000—the majority of them did not realize what their rights were and

never filed any Notices asking for a hearing or what-have-you, and were just simply eliminated or cut off or reduced.

THE WITNESS: I guess what I am saying, your Honor, is subsequent to that—if you ruled that the second Notice was illegal or improper—subsequent to that the recipient was seen or terminated and provided notice through another mechanism which informed them of their rights legally.

In other words, when they were terminated, when their certification period came up they were informed of the fact that they needed to come in and be recertified.

If they chose not to that was their decision. If they came in and they were terminated because their income exceeded the benefits they were also notified of [138] that action.

If their benefits were changed at that recertification they were also notified.

THE COURT: Are you saying that regardless of what the 16,000 Notices that went to the households may have consisted of in format, all of them eventually received an additional Notice later on that their benefits were to be reduced or eliminated?

THE WITNESS: Since that second Notice there are 193 that based upon the criteria we used to select off the computer—my answer to that would be yes.

Those 193 have not—and they may also have been informed. I can't say that. But clearly, their recertification period remains the same and they are still active.

Q. If there was a delay in inputting information about the recipient, for instance, a delay in inputting a decrease in someone's earnings and the December benefits were issued at an amount lower than the recipient was entitled to what is the result of—strike it—will the computer eventually catch up with information if it is given to the worker by the recipient? A. It is dependent upon the worker inputting new data, changing a future ATP, which is a document they use to get their Food Stamps, and also placing on the file an [139]

amount that the recipient is owed in terms of lost benefits, or what we would refer to as a forward adjustment, and then the system will issue an ATP in the future for a correct amount and will also restore the benefits that they lost.

Q. Have you, since the time these Notices have gone out, changed the format of your mass change Notice in the Food Stamp Program? A. We have started to add on the address card when we perform a mass change the old bonus value and the new bonus value as calculated by the computer.

Q. Have you put any other information on there, any other specific information on that address card? A. No.

Q. For instance, in this case it would be the earned income figure that the household has? A. The earned income figure that we have in our file has been calculated by the worker based upon certain criteria. Certain types of earned income are excluded. You do not count them at all. And the other factor that I would argue, and this is a personal perspective, we work on a calendar month, which consists of 4.333 weeks, and what a worker has to do is take the income received in a four week period, I believe, divided by 4 and multiply it by 4.333, and unless the recipient knew that calculation [140] —the assumption would be I get \$100.00 a week. Why are you saying I have \$433 worth of earned income? I only have \$400.00. It does not take into account the four weeks a year that have a fifth week.

I would argue that that can be misleading to recipients and could create as much confusion as it does provide a solution.

Q. On the card, Exhibit 1, the November Notice, under the Appeal Rights Section there are several different dates upon which recipients can appeal. Can you explain those three different dates and why you chose to put those dates there? A. They were put there because of the Federal regulation. Basically, it was a Notice—we are not required to give timely notice, in other words, to give—the normal practice is if we take a negative action within the certification period we have

to give a minimum of ten days notice before we take the action.

If the recipient appeals within that ten day period we do not take the action. We hold the action pending the appeal decision.

They also have 90 days from the date of the Notice. If they appeal—well—let me back up. In this case we did not have to give that ten days advance notice. We just had to give notice prior to the action taking [141] place.

If the recipient appeals within that ten day period then the benefits are restored pending the appeal decision.

The recipient also has 90 days in which to appeal that particular decision. If they don't file it within the ten days but they file it before 90 days have elapsed and the appeal decision is in favor of the recipient the Department is obligated to restore benefits retroactive to the date the benefits were reduced or terminated.

The third issue around appeals is that at any time that they feel the Department has done something wrong they have an opportunity to appeal what their benefit level is.

If it was not related to a specific action and the appeal referee finds in favor of the recipient the benefits will only be restored to the date that the appeal was actually submitted.

Q. Are you familiar with the approximate error rate that the Department has in the issuance of Food Stamp benefits? A. Approximately 13% of the coupons issued are in error.

Q. Can you break that down? A. Approximately 11% are overpayments either to cases [142] that are totally ineligible or cases receiving too much in terms of benefits. The other 2% are two cases receiving under the amount that they should be receiving.

That adds up to 13%, and that is a payment error rate which means that for \$100.00 expended \$13.00 is expended incorrectly. 11 of it is over-issued and 2 is under-issued.

Q. And by over-issued you mean what? A. People receiving benefits to which they are not entitled either in whole or in part.

. . .

Cross Examination by Mr. Rae

XQ. Mr Godes, isn't it true that Massachusetts was the first industrial state in the United States to implement the over changes? A. I can't answer that.

XQ. You don't know? A. I don't know.

XQ. You testified concerning the process of correcting errors. If there was a data entry backlog it is possible to correct errors by means of a forward adjustment. Does a [143] social worker have to initiate that forward adjustment by filling out certain documents? A. Yes. The social worker when they calculate or determine that there has been an under-issuance and the household is entitled to additional benefits has to complete a turn around document, which is one of the two major computer key entry documents.

XQ. If the bottleneck is in the computer data entry system after the point at which the social worker initially generates the turn around document to go to the computer that is at the actual key entry level, the social worker would not know any mistake had been made, isn't that correct? A. No, because the social worker receives when something is key entered—receives something back from the system telling them that it was key entered so they should know when, in fact, it did occur.

XQ. Do you, in fact, have any personal knowledge whether or not social workers, in fact, did generate forward adjustments for all cases affected by the backlog in the first system in October, November and December, 1981? A. No, I don't have personal knowledge.

XQ. Do you keep statistics for Food Stamp cases that are improperly denied? A. The Department does, and I do not recall those [144] statistics. My recollection is negative QC sample. In other words, the error rate is very small.

XQ. Isn't it true that those statistics are not included in that 13% error rate computation that you quoted earlier? A. Yes, that is correct. The 13% error rate relates to the actual dollars expended in the program, and how much of that is correct or incorrect—a negative sample, someone who may have been terminated improperly or someone who was denied improperly would never have gotten benefits, and so it wouldn't figure into that dollar figure.

. . .

[155] MR. RAE: Your Honor, we mentioned earlier today that we would like to put in a number of representative pages.

THE COURT: Yes. Does the defendant want to add any representative pages to the Q Exhibit? If you want to add them at a later time you may.

MR. HITOV: Your Honor, I might point out that we picked those two pages. They do portray each of the three types of errors that were testified about.

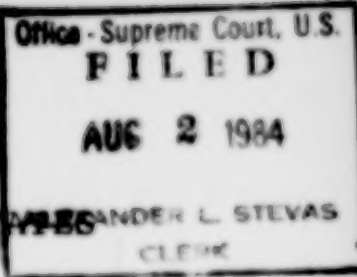
THE COURT: All right. If the defendant wants to add representative pages at a later point they will have the opportunity to do so.

. . .

PETITIONER'S BRIEF

(11) (1)

Nos. 83-6381 and 83-1660
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983



GILL PARKER, et al.,
Petitioners
v.
JOHN R. BLOCK, Secretary
of Agriculture, et al.,
Respondents

CHARLES M. ATKINS, Commissioner of
the Massachusetts Department of
Public Welfare,
Petitioner
v.
GILL PARKER, et al.
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE STATE PETITIONER

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QUESTIONS PRESENTED

1. Whether a notice from the Massachusetts Department of Public Welfare to more than 16,000 food stamp households, informing them of a federal statutory change in the earned income deduction and providing a detailed explanation of how to claim an appeal and correct any erroneous reduction or termination of benefits, satisfied the notice requirements of the Due Process Clause.

2. Whether the Court of Appeals erred in reviewing the findings of fact, which determined the constitutional question, under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a), rather than under the rule of independent review.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-6381

GILL PARKER, et al.,
Petitioners

v.

JOHN R. BLOCK, Secretary
of Agriculture, et al.,
Respondents

No. 83-1660

CHARLES M. ATKINS, Commissioner of
the Massachusetts Department of
Public Welfare,
Petitioner

v.

GILL PARKER, et al.,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE STATE PETITIONER

OPINIONS BELOW

The opinion of the United States
Court of Appeals for the First Circuit is

reported at 722 F.2d 933 (1st Cir. 1983). The opinion of the United States District Court for the District of Massachusetts is unreported. Both opinions are reprinted in the Appendix to the petition for a writ of certiorari in No. 83-1660.^{1/}

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the First Circuit was entered on December 7, 1983. Parker's petition for a writ of certiorari was received on March 9, 1984, and the Commissioner's cross-petition was filed on April 9, 1984. This Court

^{1/} The Appendix to the Commissioner of Public Welfare's (Commissioner) petition for a writ of certiorari is referred to as "PA.". The Joint Appendix is referred to as "JA.".

granted both petitions on June 18, 1984.^{2/}

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Constitution of the United States,
Amendment XIV, Due Process Clause:

" . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

Federal Rules of Civil Procedure,
Rule 52(a):

" . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"

^{2/} This brief addresses the questions presented in No. 83-1660. The Commissioner will address the questions presented in No. 83-6381 in a subsequent brief.

STATEMENT

1. This case involves the constitutionality of a notice mailed to more than 16,000 Massachusetts households, announcing an across-the-board change in one minor aspect of the Food Stamp Program. That change was mandated by Congress and had the effect of reducing each household's benefits by an average of five dollars per month.

The Food Stamp Program is a federally-funded program designed to increase the food purchasing power for low-income households. 7 U.S.C. § 2011. Congress has authorized the Secretary of Agriculture (Secretary) to formulate and administer the program. 7 U.S.C. § 2013(a); See 7 C.F.R. §§ 271 et seq. Participating states, such as Massachusetts, are responsible for the certi-

fication of applicant households and for the issuance and control of coupons. 7 U.S.C. § 2020(a).^{3/} The states are also responsible for notifying households of any changes in benefits that may occur during the household's certification period. See 7 C.F.R. §§ 273.12-15 (1981).

When a particular household experiences a benefit reduction or termination due to a change in the factual circumstances for that household, the Secretary requires the states to issue a previously approved "notice of adverse action" which must contain certain information including the proposed action, the reason for the proposed action, the household's

^{3/} Certification periods range from one month to twelve months. See 7 U.S.C. § 2012(c); 7 C.F.R. § 273.10(f) (1981).

right to request a fair hearing, the availability of continued benefits and a telephone number to contact for further information. 7 C.F.R. § 273.13(a)(2) (1981). However, certain changes initiated by the state or federal government which may affect the entire caseload or significant portions of the caseload, are considered by the Secretary to be "mass changes". 7 C.F.R. § 273.12(e) (1981). This case involves such a mass change, other examples being cost-of-living adjustments to federal benefits, annual adjustments to the shelter/dependent care deduction, or other changes based on legislative or regulatory action. Id. The Secretary leaves the format and content of a mass change notice to be determined by each state.

2. In August 1981, Congress passed the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 357 (1981), which required the states to implement spending reductions in numerous federal programs. Included among the budget cuts was an amendment to the Food Stamp Act of 1977, which lowered the so-called "earned income deduction" from 20 percent to 18 percent. Pub. L. No. 97-35, § 106; 7 U.S.C. § 2014(e).^{4/}

^{4/} The amount of food stamp benefits an eligible household receives is based upon the household's total income. 7 U.S.C. § 2014. All wages and salaries from employment are considered earned income. 7 C.F.R. § 273.9(b)(1)(i) (1981). The "earned income deduction" permits a household to deduct a percentage of its earned income from its total income to compensate for taxes, other mandatory deductions from salary, and work expenses. 7 U.S.C. § 2014(e).

In November 1981, the Massachusetts Department of Public Welfare (Department) implemented the federally required change in the earned income deduction.^{5/} In order to recalculate a household's benefits using the new statutory deduction, the Department simply had to enter a computer instruction applying the 18 percent, rather than 20 percent, deduction to existing financial information in each

5/ During this same time period, the Department was implementing other OBRA-mandated changes in the Food Stamp Program as well as substantial changes in the AFDC program. See Pub. L. 97-35, §§ 101-116 and 2301-2336. The Food Stamp Program changes included adjustments to the thrifty food plan, standard deductions and eligibility of strikers, all of which could be phased in gradually. The changes also included an alteration in the gross income eligibility standard which, like the earned income deduction, was to be promptly implemented. See Pub. L. 97-35, §§ 101-110; 46 Fed. Reg. 44712, 44721-22 (September 4, 1981).

each household's file. No additional factual information for each household was necessary to implement the congressional action.^{6/}

In determining the appropriate form of notification to the affected households, the Department was guided by the Secretary's rules governing the implementation of the OBRA changes. 46 Fed. Reg. 44712, 44722 (September 4, 1981). Since the statutory change affected a substantial number of households, the Secretary authorized the states to mail mass change notices to the affected households informing them of the legislative action.

Id.

6/ The case does not involve any allegation that mathematical errors were made in applying the 18 percent rather than the 20 percent deduction.

3. At the end of November 1981, state officials mailed a mass change notice (the November notice) to more than 19,000 households identified as having earned income and, therefore, affected by the change.^{7/} The November notice was printed on a blue card, one side in English, the other in Spanish, and inserted by machine into an envelope containing a computer card bearing the appropriate name and address. JA. 3. The November notice, dated "11/81", was entitled "IMPORTANT NOTICE -- READ CAREFULLY" and stated:

^{7/} A separate mass change notice was mailed to households terminated from the program because they exceeded the new gross income eligibility standard. JA. 56.

RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. UNDER THIS LAW, THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL CITATION: 106 CMR: 364.400)

The next portion of the notice was entitled "YOUR RIGHT TO A FAIR HEARING" and went on to explain in detail administrative appeal procedures. JA. 3.

4. On December 10, 1981, four individuals commenced this class action on behalf of all households that received the November notice. PA. 45. The District Court certified the class and issued a temporary restraining order enjoining any benefit reductions based upon the November notice, for the reason that

it did not include a precise date from which households could compute their appeal period. PA. 45-46. In compliance with the District Court's interlocutory order, the Department mailed supplemental benefits to approximately 16,640 recipients in the amount of the December reduction. PA. 46.^{8/}

At the end of December 1981, the Department issued a second notice (the December notice) dated December 26, 1981, to those 16,640 households. The December notice, written in English and Spanish, contained two cards - one yellow and the

^{8/} The Department did not mail supplemental benefits to the remaining 3,000 households that received the November notice because they were no longer eligible for any food stamp benefits. JA. 249.

other orange.^{9/} The yellow card was entitled "IMPORTANT FOOD STAMP NOTICE, READ CAREFULLY" and provided a comprehensive explanation of the effect the temporary restraining order would have on their benefits and their appeal rights. The orange card was almost identical to the November notice.^{10/} It again informed the recipients of the changes in the federal law with regard to the earned income deduction. The notice again described in detail the recipients' administrative appeal rights, including their right to receive their former benefits

^{9/} Both the November and December notices are reproduced in the Joint Appendix in their original size and format. See JA. 3-5.

^{10/} The plaintiffs sought a temporary restraining order enjoining the use of the December notice. The District Court denied that request. PA. 8.

pending an appeal and the procedures for filing an appeal.^{11/}

In order to avail themselves of the appeal process spelled out in either the November or December notices, recipients simply needed to sign, date and return the form enclosed with the notice. PA. 48.^{12/} By January 6, 1982, 331 households filed appeals from the November and December notices and continued to receive the higher benefits pending

^{11/} The scope of such an appeal would be very limited as, of course, the action by Congress was not subject to challenge in these administrative proceedings. Aside from the simple arithmetic involved, the only question was whether a household had earned income subject to the deduction.

^{12/} An appeal that was requested by telephone or in person was also considered a valid appeal. PA. 43.

appeal. PA. 49. In total, 403 households appealed. PA. 49.

5. The two-day trial of this action to test the adequacy of the December notice was held on October 14 and October 16, 1982. Three recipients testified and one recipient filed an affidavit regarding the comprehensibility of the notice. One of these recipients, Cecelia Johnson, holds two bachelor's degrees. She is employed as a mental health worker by the Massachusetts Department of Mental Health. PA. 50-51. She has participated in public assistance programs intermittently for the past fifteen years. JA. 152. Johnson's testimony was that she did not understand whether her benefits were being reduced or terminated, and that her social worker was unable to provide an adequate explanation to her.

PA. 51. She subsequently filed a timely appeal and her benefit amount was not changed until the resolution of her appeal. JA. 151; Plaintiffs' Exh. 14.

Another recipient called by plaintiffs, Stephanie Zades, is a high school graduate and is employed as the manager of the electronics department for a toy store where her responsibilities include reading instruction and operation manuals for home computers. PA. 54; JA. 133-34. She testified that she understood the words in the notice and understood that her benefits were going to be reduced or terminated but did not know which. JA. 130, 136. She has been on public assistance intermittently for fifteen years. JA. 134. Zades contacted her social worker, her attorney, and filed an appeal. JA. 131. Like Ms. Johnson, Ms.

Zades' benefits were maintained pending her appeal. JA. 132-33; Plaintiffs' Exh. 13. Court of Appeals App., Vol. II, 25.

Another recipient-witness, Gill Parker, is occasionally utilized as a reference by the Springfield Public Library as a game technician for which he is required to read and understand complex manuals. PA. 53; JA. 142. He has completed the eleventh grade. PA. 53. Parker testified that he read the notices and did not understand them. PA. 53. He contacted his social worker and his legal counsel and then filed an appeal. His benefits were not reduced, however, as a result of the OBRA change. PA. 53-54; JA. 139.

The only other recipient evidence offered by plaintiffs was contained in an affidavit by Madeline Jones, a high

school graduate, who is a senior aide in the Assessing Department of the City of Boston. PA. 55-56. She stated that she was unable to understand the November notice so she filed an appeal. PA. 56. As with the others, her benefits remained unchanged pending her appeal.

The District Court heard expert testimony from both sides on the question of the readability of the notice. JA. 187-210, 227-37. Statistical reading tests, which are intended to predict readability in terms of reading grade levels, were originally developed for educational publishers to determine whether grade school children will understand school textbooks. PA. 56; JA. 203. The most widely used reading formula, the Dale-Chall test, is a two-prong test based upon (1) a list of 3,000 so-called

"familiar" words known by at least 80% of children in fourth grade in 1948 and (2) average sentence length. PA. 58. Each word in a given reading sample which does not appear on the Dale list of 3,000 familiar words is considered "unfamiliar". The number of unfamiliar words is the principal factor in determining the level of difficulty of a given passage using the Dale-Chall test. PA. 58.

Page one of the December notice (the portion which explained the effect of the temporary restraining order), when tested by the Dale-Chall reading formula, had a readability level between the eighth and tenth grade. PA. 59. When applied to page two of the December notice, the Dale-Chall formula resulted in a wider grade range: between ninth and tenth grade, according to the Depart-

ment's expert, Dr. Culliton; between eleventh and twelfth grade, according to plaintiffs' expert, Dr. Conard. PA. 59-60.^{13/} Test results for a given passage may range as widely as two to four years. JA. 207. It was agreed that the reader's purpose in reading and his interest and background in the subject matter are important factors to consider when determining comprehensibility. PA. 63.

^{13/} The December notice contained the following words which are deemed "unfamiliar" according to the Dale-Chall test and therefore increased the reading level predicted for page two of the notice: within, division, recent, federal, benefit, benefits, eligibility, eligible, appeal, reduced, reduction, deduction, request, action, local, welfare, recent, percent, disagree, terminated, computation, contact, enclosed, and current. PA. 60.

The depositions of two additional experts were introduced in evidence. Alan Haley, a commercial typographer, discussed the industry-wide standards for typography and opined that the notices issued by the Department fell short of acceptable industry practice. JA. 157-71. Mark Bendick, whose area of expertise includes the administration of public benefit programs, introduced a survey chart indicating the years of schooling completed by the heads of Massachusetts food stamp households with earnings. JA. 127.^{14/} In Dr.

^{14/} Over 54% of the heads of such households have at least a high school degree. The remaining heads of households have completed eleven grades of schooling or less. JA. 127.

Bendick's opinion, because of the disparity between grade level completed and actual reading ability, the Department's notice should have been written so that it could have been understood by food stamp recipients who read at the sixth grade level. JA. 114.

Finally, the Court heard testimony with respect to errors which may have occurred in the implementation of this statutory change. The error rate for the issuance of food stamps generally is 13%. Of this total, 11% reflects overpayments (that is, benefits paid to households not otherwise entitled), and only 2% reflects underpayments. PA. 77. The plaintiffs introduced a sample, taken from the Department's computer printout, of 5,013 households that received the December notice. The sample showed that

211 households without earned income experienced a change in benefits. PA. 81. An additional factor considered was that during the months of October, November, and December 1981, there was some delay, due to the implementation of a new reporting system, in inputting new or changed household information in the Department's computer for AFDC recipients also receiving food stamps. PA. 79-80. This backlog was corrected by the end of December. PA. 79.

6. On March 24, 1983, the District Court issued over one hundred findings of fact, most of which summarized the evidence outlined above. PA. 42-84. The District Court concluded that the December notice failed to meet the requirements of the Due Process Clause. PA. 95.

This conclusion was based upon its finding that the notice failed to adequately inform recipients of the legislative change because it did not contain individual financial data for each household, because the wording, syntax, print size, and line lengths made the notice difficult to understand, and because there was a likelihood of error in the calculation of benefits. PA. 88-89, 96-97. The District Court also held, without discussion, that the notice failed to meet the "timely advance notice requirements" of the Food Stamp Act as well as the Secretary's requirements for individual notices of adverse action. PA. 98.

Although it did not find that any households were deprived of benefits to which they were ultimately entitled

under federal law, the District Court awarded retroactive benefits to all 16,000 members of the plaintiff class. PA. 101.^{15/} The court also entered a permanent injunction prescribing the format and content of all future food stamp notices, and ordered the state to promulgate new regulations governing the legibility and comprehensibility of such notices. PA. 101-04.

7. The Court of Appeals, feeling constrained by the narrow standard of review required by Federal Rule of Civil Procedure 52(a) for factual findings, affirmed the District Court's conclusion

^{15/} The retroactive award was to be computed by multiplying the amount of each household's monthly reduction times the number of months beginning January 1982 until the household's next certification of eligibility or termination from the program. PA. 101.

that the notice did not meet the requirements of the Due Process Clause. PA. 25. The Court of Appeals then held that if the notice was insufficient under the Due Process Clause, it did not meet the notice requirements^{16/} of 7 U.S.C. § 2020(e)(10). PA. 28.^{17/}

^{16/} It is not clear whether the Court of Appeals agreed with the District Court, that the notice was untimely. PA. 29-30.

^{17/} The plaintiffs suggest that this Court need not reach the constitutional question presented because both lower courts made independent findings that the notice violated § 2020(e)(10) of the Food Stamp Act. While the Commissioner is mindful of this Court's long-standing practice against unnecessary constitutional adjudication, resolution of the due process question is necessary to the disposition of this case. The Court of Appeals decision is predicated entirely upon a finding of a constitutional violation. The Court of Appeals merely added that since the notice did not meet the requirements of the Due Process Clause, then it could not have been adequate under the statute. PA. 31.

The Court of Appeals set aside the permanent injunctive relief awarded by the District Court as unnecessary and unwarranted. PA. 37-38. It also set aside the award of retroactive benefits to the entire plaintiff class "given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated." PA. 33.

SUMMARY OF THE ARGUMENT

1. The lower courts' determination that the Department's December notice of an across-the-board statutory change was unconstitutionally incomprehensible and unconstitutionally illegible because of its language and format has no basis in the Due Process Clause. Due process requires of a notice only that individuals

be informed of the pendency of government action and of the opportunity to challenge that action.

The notice announcing the 1981 congressional lowering of the earned income deduction fully explained the legislative change and informed those affected by the change of the opportunity for an administrative appeal. The notice was written in language familiar to food stamp households generally, and the plaintiff class representatives in particular.

2. The lower courts erred also because the Constitution does not require that a notice announcing an across-the-board congressional change in the Food Stamp Program contain the individual financial information used to make the change or the precise effect of the

legislative change on each household's benefits in order to reduce the risk of erroneous deprivation. The Court of Appeals' unwarranted constitutional requirement of individualized notices each time a program change is announced displaces the statutory and regulatory policy which distinguishes between mass change notices and adverse action notices which inform an individual household of a benefit change as a result of a change in that household's particular factual circumstances.

The risk of error inherent in the implementation of the 1981 statutory change, which simply required the application by the computer of an 18% instead of a 20% deduction to existing household information, was minimal. The single

implementation error found, which involved at the most 4.2% of the plaintiff class, and which only affected those households receiving the minimum \$10 benefit amount, was unrelated to the change in the earned income deduction and was, in any event, promptly discovered and corrected by the Department.

Although the lower courts focused solely on the notice and ignored the remainder of the Massachusetts due process structure, that structure further reduced the risk of erroneous deprivation by the post-notice safeguards available to the plaintiff class and to which the class representatives actually availed themselves. Without needing to state reasons and by the most convenient of procedures, a recipient could claim an appeal which would automatically freeze the house-

hold's benefits at the higher level until the Department could justify the application of the statutory change to the household. If a household prevailed at the hearing, or after judicial review, its benefits were permanently restored. Thus, given the nature of this congressional change and the administrative remedies available to correct any error, the Department's notice posed a minimal risk of erroneous deprivation and met the requirements of the Due Process Clause.

3. The Court of Appeals' limited review under Rule 52(a) of the District Court's so-called "findings of fact" was not appropriate where the "findings" were not based on historical facts or credibility determinations. The Court of Appeals was in as good a position as the

trial court to make the predictions as to the risk of erroneous deprivation and the ability of the plaintiff class to read and understand the notice. Moreover, where, as here, the "findings" are so interrelated to the constitutional question whether due process was afforded, the Court of Appeals should have independently examined the District Court's undisputed subsidiary findings and the record to ensure that the significant constitutional question raised by this case was correctly decided.

ARGUMENT

- I. THE NOTICE, WHICH INFORMED HOUSEHOLDS THAT CONGRESS HAD LOWERED THE EARNED INCOME DEDUCTION AND GAVE THEM AN OPPORTUNITY TO PRESENT THEIR OBJECTIONS, SATISFIED THE REQUIREMENTS OF THE DUE PROCESS CLAUSE.
 - A. Each Of The Affected Households Received A Notice Fully Conveying The Required Information On The Congressional Action.

The threshold issue in this constitutional attack on the form of the Department's notice is the appropriate standard that should be used to test the adequacy of a notice under the Due Process Clause.^{18/} Because this case involves

^{18/} Since the Department was required by federal regulation to issue a notice informing households of the statutory change, the Commissioner does not address the issue whether the Due Process Clause requires any individual administrative notice prior to the effectuation of statutory changes in welfare benefits.

the adequacy of only the notice segment of the due process bulwark, the Commissioner believes that the appropriate standard for review of the notice is to be found in this Court's notice cases -- principally Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).^{19/} Mullane holds that "[t]he fundamental requisite of due process of law is the opportunity to be heard." Id. at 314 quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914). In order for the opportunity to be heard to have any meaning, one

^{19/} The Court of Appeals viewed Mathews v. Eldridge, 424 U.S. 319 (1976), as controlling the determination of whether the notice afforded plaintiffs due process. PA. 20. The District Court scrutinized the notice under both Mathews and Mullane. See PA. 96-98. The Commissioner addresses the incorrect application of the Mathews analytical framework by the courts below in section IB, infra.

must be "informed that the matter is pending. . . ." Id. Notification of the pending action satisfies the Due Process Clause if it apprises "interested parties of the pendency of the action and afford[s] them an opportunity to present their objections. . . . The notice must be of such a nature as reasonably to convey the required information. . . ." Id. (citations omitted).^{20/}

Viewed under this standard, the December notice fully conveyed the required in-

^{20/} More recent decisions in which the adequacy of a notice was challenged apply this standard. E.g., Mennonite Board of Missions v. Adams, 103 S. Ct. 2706, 2709 (1983) (notice by publication and posting to mortgagee of a proceeding to sell mortgaged property held insufficient under Mullane); Greene v. Lindsey, 456 U.S. 444 (1982) (service of process in forcible entry or detainer proceedings by posting held insufficient under Mullane).

formation about the congressional action. Written in English and Spanish and mailed to each household, the notice informed each household that its food stamp benefits were about to be reduced or terminated because of "changes . . . made in accordance with 1981 federal law," that a recipient could request a fair hearing if he or she disagreed with the intended action, and that current benefits would be maintained or reinstated pending the outcome of the fair hearing. JA. 5. The notice explained the change in the law as one which lowers the earned income deduction from 20% to 18%, and further explained this change by stating that, in the future, "a higher portion of your household's earned income will be counted in determining your eligibility and benefit amount for food stamps." JA. 5.

Thus, the notice conveyed to each affected household the essential information about the reduction in the earned income deduction. Further, the notice was "reasonably calculated" to inform each household of "an opportunity to present their objections", Mullane, 339 U.S. at 314. Accordingly, the Department's December notice meets the applicable due process standard for notice to persons who may be affected by governmental action.

The lower courts' holding that the notice did not adequately inform households of the congressional action was based in part upon the conclusion that the language of the notice was too complex to be understood by those receiving the notice and that the format (i.e., the use of all capital letters, the type

size, and length of lines) contributed to the complexity of the notice. PA. 21, 96-97.

The unusual manner by which the District Court undertook to assess the constitutionality of this mass change notice is wholly unrelated to the simple requirements of the Due Process Clause. Its adoption by the Court of Appeals was error.

In reaching its conclusion that the language of the notice was too difficult to pass constitutional muster, the District Court relied upon reading experts who predicted the difficulty of the notice by employing the Dale-Chall test, a statistical formula that is largely based upon measuring the vocabulary used in the notice against a list of 3,000 words known to fourth graders some 35 years

ago. PA. 58. Thus, for example, the District Court found that most of the words in the notice contributed to what it found to be unconstitutional incomprehensibility. Among these constitutionally offensive words are the basic vocabulary of any welfare notice: "eligible", "appeal", "reduction", "action", "disagree", "welfare", "certification", "benefits", "recent", "federal". PA. 60, 64.^{21/}

The Commissioner leaves to reading specialists the debate as to whether the Dale-Chall test is a helpful tool in designing texts for today's school children. For the courts to use such a test to assess the constitutionality of a

^{21/} Other commonplace words such as "television" and "computer," are also not on the list of familiar words. JA. 206.

welfare notice, however, is to adopt a seriously flawed approach to constitutional adjudication. To suggest that a certain passage in a welfare notice sent to adults is less protective of due process because it includes such words as "welfare" is to ignore the realities of modern life.

Against these reading test results, which showed that the notice tested between the eighth and twelfth grade, see PA. 59-60, the District Court compared the grade levels completed by Massachusetts food stamp households. Almost 55% of the heads of Massachusetts food stamp households have either a high school degree, some college education or a college degree. JA. 127. This is the education level, according to plaintiffs' reading specialist, that was necessary

to understand the notice without taking into consideration the recipients' background and familiarity with food stamp notice forms and vocabulary.^{22/} It is the apparent disparity between the reading level of the notice and the grade levels completed by all the food stamp heads of households which was the basis for the conclusion by the courts below that the notice was unconstitutionally incomprehensible to Massachusetts recipients.

The District Court conclusion that the language was unconstitutionally difficult is not based upon the testimony

^{22/} According to the Department's reading expert, however, page two of the December notice tested at a ninth to tenth grade level. The evidence showed that over 85% of the heads of Massachusetts food stamp households with earnings completed nine grades of schooling or more. JA. 127.

of the three witness-recipients. The recipients testified that although they did not understand the precise effect of the legislative change, they knew the meaning of the words used in the notice. See, e.g., testimony of Stephanie Zades, JA. 136-37; testimony of Gill Parker, JA. 145. In addition, each recipient indicated a familiarity with welfare notice forms, and the terms and concepts they contained. See, e.g., JA. 155-56.

As to legibility, the District Court, relying on the testimony of a commercial typographer,^{23/} found "[t]he length of the lines in the December notice are from two to three times longer than that which

^{23/} The notice was not printed by means of typography; it was typed on a typewriter.

is considered acceptable for text copy Considering the size of the point used and the line length, there should have been two points of additional line spacing The production quality of the December notice includes the following: page one is overinked, creating black spots in the text, while page two is underinked, resulting in a grey copy." PA. 68-69.

No one can dispute that it is preferable to issue a food stamp notice that is properly "inked", contains lines of suitable length and that does not contain a complex phrase such as "earned income deduction". But it does not necessarily follow that the absence of such features render a notice of a congressionally mandated program change unconstitutional. By relying on plaintiffs' outside experts

schooled in reading, typography, and efficiency in the administration of welfare programs to judge the adequacy of the Department's notice under the Due Process Clause, the courts below lost sight of the purpose of due process and the standard by which a notice should be judged.

Those agencies and officials charged with informing households of statutory changes in public benefit programs must be guided by the well-settled due process principles announced in Mullane. Yet, it is clear from the decisions below that the Department's notice was not reviewed to determine whether it reasonably conveyed the required information; rather, it was dissected, scrutinized, and measured against standards and obligations which are unrelated to the language and purpose of the Fourteenth Amendment. The

lower courts effectively imposed obligations on the states, under the aegis of the Due Process Clause, which neither Congress nor the Secretary saw fit to require as part of the administration of the Food Stamp Program.^{24/} Cf. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (courts should refrain from imposing procedural requirements on agencies which are not required by statute).

The type of after-the-fact review of mass change notices sanctioned by the

^{24/} Although the Court of Appeals vacated the District Court's injunction requiring regulations setting forth prescribed standards for legibility and comprehensibility as "unnecessary and unwarranted," it will be necessary for the states to employ reading experts simply to meet their obligations under that Court's view of what the Due Process Clause requires of mass change notices.

Court of Appeals will impose needless burdens on every state in the name of due process. The inescapable consequence of the lower courts' holding is that a state must engage in something akin to market research each time it apprises pertinent citizens of a congressional change in benefits law. The notice will have to be matched to the reading abilities of the particular group receiving the notice. Notwithstanding the District Court's finding to the contrary, given the complex statutory and regulatory framework for most public assistance programs, including the Food Stamp Program, explaining statutory changes with words that are contained in the list of 3,000 words familiar to fourth graders in 1948 is a formidable task. See Greene v. Lindsay, 456 U.S. at 451 quoting North Laramie Land Co. v.

Hoffman, 268 U.S. 276, 283 (1925) (notice "must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.").

Notices that can be understood by an adult who reads at the fifth-sixth grade level may, indeed, be desirable. To incorporate such a requirement into the Fourteenth Amendment would be a disaster. The ultimate validity of administrative action will depend upon the outcome of a battle of experts in the courts, long after the action has been taken. This after-the-fact factual inquiry into the adequacy of a notice can be a "virtual engine of destruction" with respect to an agency's execution of its mandatory, statutory duties. Cf. Weinberger v. Salfi, 422 U.S. 749, 772-73 (1975) (application of irrebutable presumption

analysis to welfare legislation would invalidate countless legislative judgments which have been thought wholly consistent with the Fourteenth Amendment).

The paternalistic theory of due process adopted by the District Court and affirmed by the Court of Appeals, trivializes the concept of due process. It also threatens to destroy administrative flexibility and discretion by imposing a requirement that agencies provide the best notice possible, as determined after the fact by the courts. Although due process is a flexible concept, tailored to the context in which it is invoked, the lower courts went too far in requiring that the language communicated to citizens match their hypothetical reading abilities. The Fourteenth Amendment does not enact the Dale-Chall test.

- B. Incorrectly Applying Mathews v. Eldridge, The Courts Below Concluded Erroneously That The Format And Content Of The Notice Contributed To A Risk Of Erroneous Deprivation And That There Was Probable Value In A Different Type Of Notice.

The Courts below measured the sufficiency of the Department's notice by utilizing the approach in Mathews v. Eldridge, 424 U.S. 319 (1976). The Commissioner believes that this case is controlled by the analysis in Mullane, not Mathews; yet even under Mathews, the notice of statutory change satisfied due process requirements.

Addressing the adequacy of hearing procedures, Mathews sets forth three factors that should be considered when determining whether such procedures are constitutionally sufficient:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 334-35.

The Mathews analysis has been utilized often to determine whether the opportunity for a hearing, prior or subsequent to, the deprivation of a liberty or property interest, is necessary and, if so, whether the hearing procedures are adequate.^{25/}

^{25/} E.g., Mackey v. Montrym, 443 U.S. 1 (1979)(no hearing is necessary prior to suspension of drivers license); Schweiker

(footnote continued)

However, this Court has not applied the Mathews test to a notice case. The distinction between "notice" and "hearing" cases is marked clearly in Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-19 (1978). In Memphis, a utility company's notice of service termination and hearing procedure were challenged in one action. The Court applied Mullane to examine the adequacy of the notice, Id. at 13-14, and Mathews to examine the adequacy of the hearing procedure, Id. at 17-18.

The examination of the format, language, and content of a single notice to determine whether it meets the require-

(footnote continued)

v. McClure, 456 U.S. 188 (1982) (nature of hearing on disputed Medicare claims comports with due process).

ments of the Due Process Clause does not lend itself to the Mathews analytical framework. In particular, the second Mathews factor, "the risk of erroneous deprivation and probable value . . . of additional or substitute procedural safeguards", which looks to the protections afforded by administrative safeguards as a whole, should not be applied to a single aspect of the administrative process. Neither should the constitutionality of a notice depend upon an after-the-fact inquiry by the courts into the circumstances faced by a state agency implementing, in good faith, substantial federal program changes. Nevertheless, as the Commissioner shows below, even if the three-part Mathews test should be utilized to judge the adequacy of a notice, it was improperly applied in this case.

1. In Concluding That There Was A Risk of Erroneous Deprivation, The Courts Below Failed To Give Proper Weight To The Appeal Portion Of The Notice As Well As All The Available Administrative Safeguards.

Mathews examines the totality of the administrative procedures available to the claimant, from the agency's initial communication to the claimant up through the opportunity for judicial review, to determine whether there has been a deprivation of property without due process. Id. at 337-39. E.g., Mackey v. Montrym, 443 U.S. 1, 14-17 (1979). Cf. Parratt v. Taylor, 451 U.S. 527 (1981) (admittedly erroneous deprivation of property does not constitute a violation of the Due Process Clause where subsequent procedures are available to restore loss); see also Hudson v. Palmer, 52 U.S.L.W.

5052 (U.S. July 3, 1984). Here, however, the courts below focused exclusively on the perceived infirmities of only that portion of the notice that explained the legislative action. They virtually ignored the balance of the notice which fully informed households of their right to challenge the Department's action, their right to receive a continuation of benefits pending an appeal, and the precise manner in which they should claim an appeal.^{26/}

^{26/} The appeal portion of the notice stated in capital letters:

YOUR RIGHT TO A FAIR HEARING:

You have the right to request a fair hearing if you disagree with this action. If you are requesting a hearing, your food stamp benefits will be reinstated at the current amount if your appeal is received

(footnote continued)

In Memphis, 436 U.S. at 14-15, a utility's termination notice was held inadequate because it did not apprise the customer of the availability of a procedure to challenge the termination. Memphis considered the information about a hearing procedure to be a critical as-

(footnote continued)

by the division of hearing within 10 days of this notice. If your appeal is denied, the Department has the right to recover from you any added benefits which you received during the appeal process. You may still appeal this action after ten days, but you must do so within 90 days of the date of this notice. Otherwise, your request for hearing after that date will be denied. To request a fair hearing, you must sign and date the enclosed card on which your name and address are pre-printed and mail it to: Division of Hearings, P.O. Box 167, Essex Station, Boston, MA 02112. If you have questions concerning the correctness of your benefits computation or the fair hearing process, contact your local welfare office. You may file an appeal at any time if you feel that you are not receiving the correct amount of food stamps. JA. 5.

pect of the utility termination notice. Here, the Department's notice provided households with detailed information about the appeal process.

In addition to adequate notice of the appeal process, the actual administrative process afforded households a meaningful remedy. First, although the potential for factual disputes in this across-the-board statutory reduction was minimal, an appeal was not limited to a mistake in the application of this particular statutory change but could be claimed for any reason (or, theoretically, for no reason at all). Second, the appeal procedure was simple; a form enclosed with the notice merely had to be signed and dated and returned to the address listed on the notice. However, to ensure that valid appeals were not

lost on timeliness or other technical grounds, an appeal that was requested by telephone or in person was also considered a valid appeal. PA. 48. Third, households that filed timely appeals had their benefits restored pending the appeal. PA. 49. Fourth, an individual was given a full hearing before an impartial hearing officer and could present evidence as well as require the Department to justify its application of the earned income deduction change to the household's situation. Finally, the Department's final administrative decision in any of these cases was, as is universally true in any welfare determination in Massachusetts, subject to judicial review. Mass. Gen. Laws Ann. ch. 30A, § 14 (West 1979). If a household could show that a reduction of benefits

was unwarranted for any reason, the program provided for a full restoration of benefits. See Pub. L. 95-113, § 1301, 91 Stat. 958, 7 U.S.C. § 2023(b).

Each recipient-witness in this case took full advantage of the administrative appeal process. Each filed for an administrative appeal. PA. 52, 53, 55. The fair hearings for Ms. Zades and Ms. Johnson, which also included their appeal from unrelated reductions in AFDC benefits, resulted in a redetermination of both their food stamp and AFDC benefits.^{27/} Although Mr. Parker filed an

^{27/} The hearing officers did not find that Ms. Johnson and Ms. Zades had received less food stamp benefits than they were entitled; nonetheless, the Department was ordered to review their files to ensure that they received the proper amount. See Plaintiffs' Exhibits 13 and 14, Court of Appeals App., Vol. II, 25, 58.

appeal, his food stamp benefits actually increased in December, and thereafter, from \$72.00 per month to \$106.00 per month. PA. 53-54.

Given the extensive administrative safeguards available to each household to challenge and remedy any incorrect application of this legislative action, it is clear that the plaintiff class received all the "process" that was due in the circumstances of this congressional reduction in food stamp benefits.

2. The Decisions Of The District Court And the Court Of Appeals Are Based Upon An Improper Assessment Of The Risk Of Erroneous Deprivation.

The courts below focused almost exclusively on the second Mathews factor: "the risk of erroneous deprivation . . .

through the procedures used and the probable value, if any, of additional procedural safeguards,* in concluding that, as a matter of constitutional law, this notice and all mass change notices must contain individualized financial data, so that a household could determine whether its benefits were properly calculated and, therefore, whether it should claim an appeal.^{28/}

The lower court's assessment of the risk of erroneous deprivation was based, in large part, on unusual circumstances at the Department that existed at the time the notice was sent. The District Court found that due to the implementa-

^{28/} The District Court concluded that this mass change notice should have contained each household's old benefit amount, new benefit amount, and amount of household earned income. PA. 100.

tion of numerous OBRA-mandated changes in other benefit programs as well as in the Food Stamp Program, there were delays in the entry of new or changed household data into the Department's computer and therefore many households could have received an incorrect January benefit amount. PA. 79.^{29/} It was this admin-

^{29/} The delays were attributable to the implementation of a pilot monthly reporting system in the AFDC program which affected about 9,000 food stamp households. PA. 79.

The District Court found that the computer backlog was corrected by the end of December. PA. 79. The record does not show whether any new or changed household information, which may not have been entered in the computer prior to the December cutoff date for calculating January benefits, resulted in overpayments or underpayments. The likelihood of overpayments, however, was at least as great as underpayments, as Congress has determined that the greater percentage of erroneous benefit payments under the Food

(footnote continued)

istrative backlog which the District Court improperly equated with a risk of erroneous deprivation stemming from the mass change notice.^{30/}

(footnote continued)

Stamp Program are overpayments. The largest source of errors is the failure on the part of a household to report changes in household information instead of agency error. See H.R. Rep. 95-464, 95th Congress, 1st Sess. 353-58, reprinted in 1977 U.S. Code Cong. & Ad. News 2285-90. This is consistent with the error rate statistics in Massachusetts in 1981, which indicate a 13% incorrect payment rate--11% overpayments and only 2% underpayments. PA. 77.

^{30/} On this issue, the Court of Appeals decision contains a fundamental inconsistency. Although it accepted the District Court's conclusion as to the risk of erroneous deprivation, it reversed the award of retroactive benefits to the entire class "given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated." PA. 33.

The proper risk assessment, however, focuses on the risk of error inherent in this notice of statutory reductions, see Mathews, 424 U.S. at 344-45, rather than an assessment of all pre-existing problems in case files which may have resulted in errors in the households' regular monthly benefits.^{31/}

^{31/} The lower courts' method of analyzing the risk of erroneous deprivation, by including all possible errors from whatever source, is not only inconsistent with Mathews, it has far-reaching effects on the the administration of public assistance programs. Under the Court of Appeals decision, as a matter of constitutional law, state and federal agencies, when announcing even the most minimal statutory or regulatory program reductions, would be required to formulate an individualized notice that would alert recipients of not only potential errors stemming from the mass change, but also those errors which might result from inaccuracies in past applications, erroneous calculations, stale data, or any other source.

The risk of erroneous deprivation attributable to the implementation of this across-the-board statutory change in the earned income deduction was minimal. This federal statutory change did not require the adjustment, adjudication, or addition of any individual data in a household's case file. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of public assistance based upon individual factual circumstances). In cases involving such individualized factual determinations, the Secretary requires the Department to issue an individual notice of adverse action. 7 U.S.C. § 2020(e)(10); 7 C.F.R. § 273.13(a)(2)(1981).^{32/} Nor did the

^{32/} The individual notice of adverse action and fair hearing procedure, which involve a factual adjudication for a particular household, were incorporated into

(footnote continued)

statutory change require a total revision of the manner by which benefit amounts are computed. The statutory change simply required a computer recalculation of each household's benefits, utilizing existing financial and other relevant information.

Since there is no allegation or indication that the computer applied something other than the 18% deduction to each household's income, the only serious

(footnote continued)

the Food Stamp Act in response to Goldberg v. Kelly, supra. See H.R. Rep. 95-464, 95th Congress, 1st Sess. 285-86, reprinted in 1977 U.S. Code Cong. & Ad. News 2220-22. Significantly, neither Congress nor the Secretary found that the same due process interests at the heart of Goldberg required individualized treatment in mass change situations. The judgment of those bodies, while not conclusive on this Court, is certainly entitled to consideration as the Court weighs the government interest as part of the Mathews balance.

risk of erroneous deprivation inherent in this particular statutory reduction involves households without earned income that may have had their benefits reduced. There were, in fact, certain households without earned income (but with other types of income such as AFDC benefits or social security) that had a benefit amount prior to the statutory change of \$10 and who had their benefits reduced to less than the required \$10 minimum. JA. 44.^{33/} The District Court found that 211 of these 5,013 sample households without earned income experienced a change in benefits and, therefore, there was a serious risk of erroneous deprivation. It is undisputed, however, that

^{33/} The Secretary's regulations require households with one or two people to receive a minimum of \$10. See 7 C.F.R. § 273.10(e)(2)(iii)(B) (1981).

the Department promptly recognized this flaw in the computer program and corrected the error. JA. 49, 250.^{34/} This single implementation error, which had nothing to do with the notice and was promptly corrected, reflects a 4.2% error rate. Assuming each error was an underpayment, 4.2% of the sample temporarily losing less than ten dollars of benefits hardly represents the serious risk of erroneous deprivation which warrants the conclusion that the notice was unconstitutional.

The Due Process Clause does not ensure an error-free implementation of entitlement programs. As this Court has stated,

^{34/} There was no evidence at trial that any of these households did not have their benefits restored to the \$10 minimum. Only then would they have suffered an erroneous deprivation.

. . . [T]he Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or liberty' interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations. Mackey v. Montrym, 443 U.S. at 13.

The creation of methods to attain that objective is best left to Congress and to those agencies charged with administering the programs.^{35/} E.g., Califano v. Boles, 443 U.S. 282, 285 (1979) ("Fairness can be best assured by Congress and the

^{35/} Because of the significant problem of overpayments to households, Congress has, in fact, established a financial incentive mechanism designed to encourage states to reduce the program error rate by withholding a share of administrative funds if the state's error rate exceeds a specified ceiling. See P.L. 95-113, § 1301, 91 Stat. 913, 976-77, 7 U.S.C. § 2025.

Social Security Administration through sound managerial techniques and quality control designed to achieve an acceptable rate of error.").

The District Court decision, as affirmed by the Court of Appeals, tests the constitutionality of this mass change notice in a manner which is not only inconsistent with established due process principles but conflicts with congressional policy. Congress has set forth explicit requirements for individual notices of adverse action. 7 U.S.C. § 2020(e)(10). In contrast, the statute is silent as to mass change notices. The result, which places an affirmative burden on the Department to issue mass change notices which include certain individualized data in each of 16,000 notices, indicates that the Court of Appeals failed to recognize that "[t]he

role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." Landon v. Plasencia, 459 U.S. 21, 34-35 (1982). The decisions below have ignored the clearly expressed statutory and regulatory policy which distinguishes between notices of adverse action and mass change notices. See H.R. Rep. 95-464, 95th Congress, 1st Sess. 289, reprinted in 1977 U.S. Code Cong. & Ad. News 2224-25.

3. The Probable Value Of A More Detailed Notice Was Not Significant.

The second part of a proper "risk of erroneous deprivation" analysis under Mathews is a determination of the prob-

able value of different procedures. The courts below concluded that a mass change notice that contained each household's old and new benefit amount, as well as its amount of earned income, would reduce the risk of erroneous deprivation. PA. 17-18, 90.^{36/}

There is no support in the record for the District Court's finding that the probable value of a more detailed notice was great. Since the purpose of a notice is to apprise an individual of the pendency of an action and afford opportunity to challenge that action, the only potential benefit of a more detailed notice is to provide a household with

^{36/} The "value of different procedures" --which is the issue in Mathews--cannot necessarily be equated with the value of a more detailed notice, the question actually addressed by the courts below.

more or clearer information so that it can better determine whether to challenge the action.

There was no evidence at trial that any household was unable to determine whether to take an appeal because the notice did not contain individual financial information. The fact that all five recipients who represented the plaintiff class, and who claimed not to understand the precise effect of the statutory change, filed appeals, bears this out. PA. 50, 53, 55, 56.

In fact, it was the opinion of plaintiffs' expert on the administration of welfare programs that when a recipient is not given detailed notice of some agency action, or he is confused by a notice, he is more likely to appeal

or contact the agency by telephone. JA. 100.^{37/}

As stated earlier, the only possible erroneous deprivation inherent in this statutory change involved the 211 households that did not have earned income but who nonetheless experienced a brief and minimal (no more than \$10) change in benefits.^{38/} The more detailed notice demanded by the courts below, which would show those households' earned income as zero, provides no more meaningful infor-

^{37/} Plaintiffs' expert testified that increased calls and appeals will hamper the efficiency of public assistance programs. This, of course, is irrelevant to the issue whether the notice meets the requirements of the Due Process Clause.

^{38/} It bears repeating that there was no evidence to show that any of these households were actually deprived of food stamp benefits to which they were otherwise entitled.

mation than would a general notice. A recipient without earned income who receives a notice that his benefits may be reduced because of a change in the earned income deduction is put on notice that something may be amiss and is likely to contact a social worker, file an appeal, or both.^{39/}

Even assuming that the purpose of notice is to alert the household of any underlying errors in the Department's data, the added benefit of including the earned income figure on this mass change notice was challenged by the head of the

^{39/} As noted earlier, a recipient need not specify a ground for appeal. A request for a fair hearing can serve the simple purpose of freezing the household's benefit level until the Department can justify to that household the correctness of its action.

Department's procedures and policy unit. He testified that the earned income figure actually in the computer system, and, therefore, capable of being produced on the notice might have been misleading to households and would have created as much confusion as assistance. JA. 254.^{40/}

As this Court has recently stated, "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitle-

^{40/} For example, not all types of earned income are included when determining benefits. Also, the Department uses a monthly earned income figure based upon 4.33 weeks in a month. Thus, for example, a recipient who knows that his weekly earned income is \$25 might be confused by a notice which shows his monthly earned income figure as \$108.25. JA. 254.

ment." Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983). In order to protect those households without earned income who do have a substantive interest in receiving benefits unaffected by the statutory change, a general notice announcing the statutory reduction is sufficient. Due process only "calls for such procedural protections as the particular situation demands." Mathews, 424 U.S. at 334 quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1982). Cf. Codd v. Velger, 429 U.S. 624, 627 (1977) (per curiam) (where there is no factual dispute, due process does not require a hearing).

Accordingly, the conclusion that a more detailed notice in the mass change context is constitutionally required is unwarranted.

II. THE LIMITED STANDARD OF REVIEW USED BY THE COURT OF APPEALS EFFECTIVELY PRECLUDED APPELLATE REVIEW OF A SIGNIFICANT CONSTITUTIONAL QUESTION.

In its review of the District Court decision, the Court of Appeals limited itself to the restrictive standard of review set forth in Fed. R. Civ. P. 52(a):

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The Court of Appeals stated, "[i]n affirming the court's conclusion that the December notice was constitutionally inadequate, we stress the limited scope of our review . . .", PA. 25-26, and noted that it could reverse the District Court only if it had "the definite and firm conviction that a mistake has been com-

mitted." PA. 20. Thus, the Court of Appeals held, "we do not find clearly erroneous the District Court's conclusion that there was substantial risk of calculation error." PA. 23. The Court of Appeals also held that the District Court, in concluding that the December notice was difficult to read, relatively difficult to comprehend and ambiguous, did not commit clear error. PA. 21.

The application of this limited standard to review the District Court's decision that the plaintiff class was not afforded due process under the Fourteenth Amendment is improper for two reasons. First, the "facts" relied upon by the District Court are not the type of facts that Rule 52(a) is intended to govern. Second, even if they were the type of facts entitled to deference under Rule

52(a), they are so interrelated to the ultimate constitutional question as to require independent review.

Rule 52(a) itself incorporates the fundamental rationale underlying deference to the trial court's findings of fact: the opportunity of the trial court to judge the credibility of the witnesses. United States v. Gypsum Co., 333 U.S. 364, 395-96 (1948).^{41/} See also United States v. Oregon Medical Soc., 343 U.S. 326, 332 (1952) ("[t]here is no case more appropriate for adherence

^{41/} Rule 52(a) was intended to make applicable in all actions tried without a jury the then prevailing equity practice: "that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would be best judged, had great weight with the appellate court." Id. at 394-95.

to [Rule 52(a)] than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.").

This Court has recognized that not all "facts" found by the trial court are entitled to the Rule 52(a) deference.

"[I]ssue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. Watts v. Indiana, 338 U.S. 49, 51 (1949) (citation omitted).

This litigation involving the adequacy of a notice under the Due Process Clause, when either the Mathews balancing

test or the Mullane standard is utilized, does not present fact questions which are entitled to deference by an appellate court. Whether the language and format of a notice poses a "risk of erroneous deprivation" or whether it is "reasonably designed to convey the required information" does not require resolution of historical facts which turn on issues of credibility. In this case, the relevant factual questions as to error and the statistical reading test results were undisputed. The District Court findings were, instead, determinations of a predictive nature which did not depend upon the unique opportunity of the trial court to observe the witnesses' demeanor. Whether the language of the notice was appropriate to inform over 16,000 households of the congressional action or

whether the line lengths and print quality were constitutionally adequate are questions of judgment which any appellate court is in as good a position to make as the trial court.^{42/} Even if the District Court findings were of the sort that depended on historical or credibility determinations for their resolution, they are so fundamentally intermingled with the ultimate constitutional question as to require independent review. This past term in Bose Corp. v.

^{42/} The District Court's findings as to the risk of erroneous deprivation and comprehensibility can also be viewed as mixed questions of law and fact because they involved the application of admitted facts to the rule of law set forth in Mathews and Mullane. The propriety of using this limited standard to review such mixed questions is also questionable. See Pullman-Standard v. Swint, 456 U.S. 273, 289-90 n.19 (1982).

Consumer Union of U.S., Inc., 104 S. Ct. 1949, 1953 (1984), this Court affirmed the First Circuit's independent review of a District Court "determination that a false statement was made with the kind of 'actual malice' described in New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). . . ." Bose continued a long line of decisions under the First Amendment which hold that judges have a duty to review independently at least those factual matters which determine a constitutional question.^{43/}

^{43/} E.g., New York Times Co. v. Sullivan, 376 U.S. at 285; Norris v. Alabama, 294 U.S. 587, 589-90 (1935); Jacobellis v. State of Ohio, 378 U.S. 184, 189 (1965); Estes v. Texas, 381 U.S. 532, 567 (1965) (Warren, C.J., concurring); Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

The rule of "independent review" has not been limited to First Amendment cases, however. In Watts v. Indiana, 338 U.S. 49, 51 (1949), the rule of independent review was applied to a case decided under the Due Process Clause of the Fourteenth Amendment. The Court commented:

Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. (citations omitted).

While the underlying rationale for undertaking independent review of both legal and factual matters has been to ensure the safeguarding of constitutional rights, Norris v. Alabama, 294 U.S. at 590; Bose, 104 S. Ct. at 1965, independent review also serves to ensure that

constitutional questions raising significant public policy issues are correctly and consistently decided by the lower federal courts.^{44/}

In cases involving the construction of the Due Process Clause, "the stakes --in terms of impact on future cases and future conduct--are too great to entrust them finally to the judgment of the

^{44/} Indeed, the standard of review adopted by the Court of Appeals deprives the Court of the ability to ensure the uniform application of the Due Process Clause even in its own circuit. It is certainly possible that a district judge in New Hampshire, for instance, could have "found", on an identical trial record, that the risk of error in implementing the mass change was minimal or that the notice was sufficiently comprehensible as to be constitutional. Under the Court of Appeals approach to Rule 52(a), the same notice would thus be constitutional in New Hampshire but not in Massachusetts.

trier of fact." Bose, 104 S. Ct. 1960 n.17.^{45/}

An independent review of the District Court's subsidiary findings as well as the undisputed facts in the record itself uncovers the flaws in the District Court's conclusion that the notice did not meet the minimal requirements of the Due Process Clause. Several examples are instructive. With respect to the comprehensibility of the notice, the Court of Appeals affirmed the District Court's findings that the notice was incomprehensible to many of the recipients.

^{45/} Appellate Courts should not be precluded from reviewing "broadly social judgment--judgments lying close to opinion regarding the whole nature of government and the duties and immunities of citizenship." Id. at 1959 n.16 quoting Baumgartner v. United States, 322 U.S. 665, 670-71 (1944).

PA. 9. While both courts relied on the statistical reading test results for this finding, other findings ignored by the Court of Appeals show that comprehensibility determinations cannot be made without considering "[t]he reader's background, interest, and motivation in the subject matter" PA. 63.

Those readers who have no interest or background in the subject matter of certain reading material may find little meaning in it; for other readers who were interested in the subject, the same reading material may be most comfortable readings. This difference in ease of reading and comprehension may exist even though both groups of readers have completed the same years of schooling and have the same general reading ability on a standardized reading test. PA. 63-64.

The evidence showed that food stamp households have a substantial "background" in the language of food stamp

notices. The very words that were deemed "unfamiliar" and, therefore, contributed to the reading grade level of this mass change notice, appear on every food stamp form that households receive on a periodic basis. Finding no. 55, for example, reads:

"At the [household's] initial certification and all subsequent recertifications, households must complete an "Application Form." Contained in the application form are the words action, apply, eligible, benefits, deductions, information, fair hearing, disagree, hearing, eligibility."
PA. 65.

These same words appear in the "change of report form" which must be filled out each time household has a change in its income, expenses, or household size, and the "recertification of eligibility form"

which is filled out and submitted at every recertification. PA. 66-67.^{46/}

The flaw in applying, and relying upon, a statistical reading test to predict comprehensibility of this mass change notice is made clear by evidence that all the witness-recipients themselves understood the words in the notice. The record shows unequivocally that they knew that their benefits would be reduced or terminated because of a congressional action and they understood, and took advantage of, the administrative appeal process.

Finally, it is the Court of Appeals affirmance of the District Court's

^{46/} Plaintiffs' reading expert admitted that she did not examine the Department's forms and notices that were periodically sent to every food stamp household and which contained the so-called "unfamiliar" words. JA. 207-08.

"finding" of a substantial risk of error which best states the case for adopting the rule of independent review. The District Court's conclusion that the notice lacked sufficient detail to meet the requirement of the Due Process Clause, is in large part based upon its finding of a substantial risk of erroneous deprivation inherent in the Department's general notice. Even though the Court of Appeals expressly deferred to this finding, PA. 23, it also recognized that there was "an absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated." PA. 33. The record, in fact, does not show a single household that did not receive all the benefits to which it was entitled. This deference to the District Court on a

critical factor in the Mathews rule is incorrect, and, as the Court of Appeals itself acknowledged, not supported by the evidence.

The Department's elimination of its backlog by the end of December, PA. 79, its correction of the computer program relating to those 211 households without earned income, JA. 49, 250, and existence of a protective appeal mechanism afforded to all households and to which the class representatives availed themselves, clearly show that the "finding" of a substantial risk of erroneous deprivation is incorrect.

Accordingly, the Court of Appeals' limited review of the District Court's decision, particularly those "findings" relating to the risk of erroneous deprivation and comprehensibility, deprived

the court of its proper authority to review a significant constitutional question the result of which sets forth extraordinary due process requirements for the future. An independent examination of the District Court's own subsidiary findings as well as the record in this case reveals the error in the Court of Appeals conclusion that the Department's notice did not meet the requirements of the Due Process Clause.

CONCLUSION

For the foregoing reasons the Massachusetts Commissioner of Public Welfare requests that the decision of the Court of Appeals declaring the Department's notice unconstitutional be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES M. ATKINS, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
PETITIONER

v.

GILL PARKER, ET AL.

GILL PARKER, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF FOR THE FEDERAL RESPONDENT
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QUESTIONS PRESENTED *

1. Whether the Due Process Clause requires that individualized advance notice be given to each affected food stamp recipient prior to the implementation of statutory benefit level adjustments, when the statutory change can be implemented without any new or additional factual findings as to individual recipients.

2. Assuming that the Due Process Clause requires some type of individualized advance notice, whether the notices issued by the Massachusetts Department of Public Welfare in the instant case, coupled with the other procedures for reducing the risk of error, were constitutionally sufficient.

3. Whether the notices in this case were adequate under the Food Stamp Act and the pertinent federal regulations.

* This brief will address only those issues presented in the Commonwealth's petition, No. 83-1660. The remedy issues presented by plaintiff-respondents in No. 83-6381 will be addressed in our reply brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1660

CHARLES M. ATKINS, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
PETITIONER

v.

GILL PARKER, ET AL.

No. 83-6381

GILL PARKER, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT
SUPPORTING REVERSAL

(1)

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A38)¹ is reported at 722 F.2d 933. The opinion of the district court (Pet. App. A42-A98) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1983. The petition in No. 83-6381 was filed on March 6, 1984. The conditional cross-petition, No. 83-1660, was filed on April 9, 1984. The petition and the cross-petition were granted on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Food Stamp Act, 7 U.S.C. 2011 *et seq.*, the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 *et seq.*, and the implementing regulations, 7 C.F.R. Pts. 272-273, are set forth in the appendix to this brief.

STATEMENT

1. The Food Stamp program is a federally-funded, state-administered effort to "permit low-income households to obtain a more nutritious diet through normal channels of trade" (7 U.S.C. 2011). Unlike the "categorical" welfare benefit programs such as Supplemental Security Income (SSI) or Aid to Families with Dependent Children (AFDC), persons may participate in the Food Stamp program solely on the basis of income and resources. For this reason, the Food Stamp program is the largest of the federal welfare programs; over 20 million Americans—almost one of every eleven—receive food stamps.

¹ "Pet. App." denotes the appendix to the petition in No. 83-1660.

The Secretary of Agriculture prescribes uniform standards for food stamp eligibility (see 7 U.S.C. 2014). Individual eligibility determinations are made by agencies of the states pursuant to approved plans under federal standards. State agencies also perform the actual distribution of coupons ("food stamps"). 7 U.S.C. 2020(a). Households certified as eligible are issued food stamps that may be used to purchase food at approved stores. 7 U.S.C. 2012, 2013. Food stamps are redeemed through the United States Treasury; the federal government bears the entire cost. 7 U.S.C. 2013(a). The Secretary is authorized to reimburse the state agencies for 50% of the administrative costs associated with processing applications, storing and distributing coupons, and making administrative determinations. 7 U.S.C. 2025(a).²

a. Eligibility for, and level of, food stamp benefits is largely based upon a comparison of the cost of a diet sufficient to feed the household, including an allowance for purchase error, waste, and spoilage,³ with income, net of certain deductions.⁴ Until a new monthly reporting

² This reimbursement rate may be adjusted downward or upward in accordance with the state's error rate. 7 U.S.C. 2025(c) and (d).

³ The allotment is based upon the cost of a "Thrifty Food Plan" or "TFP" (7 U.S.C. 2012(o)) which is, in turn, inflated intentionally to permit variety, to allow for excess in the recommended daily allowances for food energy levels, and to account for purchase error, waste, and spoilage. H.R. Rep. 95-464, 95th Cong., 1st Sess. 186-207 (1977). As of this writing, the maximum allotment for a family of four in the continental United States is \$253 per month (48 Fed. Reg. 45442-45444 (Oct. 5, 1983)). Eligible households of one or two members are guaranteed a monthly minimum benefit of \$10 (7 U.S.C. 2017(a); 7 C.F.R. 273.10(e)(2)(ii)(C)).

⁴ In addition to the deduction involved in this case, recipients are permitted a standard deduction of \$89 for each household. A household may also qualify for additional deductions totalling up to \$125 per month for dependent care and "excess shelter" costs (the cost of housing exceeding 50% of net income). Medical expenses over \$35 for the elderly and disabled are deductible with-

system went into effect, households certified as eligible for food stamp benefits ordinarily received the same level of benefits for each month of their certification period.⁵ Even before implementation of monthly reporting, certain events would trigger a reduction in the level of benefits prior to the end of a household's certification period—for example, an increase in household income, the departure of a dependent from the household, or a conviction for program fraud. Such events would cause the state to commence a household-specific "adverse action" proceeding. Except where the state learns of such events through a report from the beneficiary household itself, federal regulations require that, 10 days prior to the effective date of the adverse action, the household be sent a notice stating (7 C.F.R. 273.13(a)(2) (1983)):⁶

The proposed action; the reason for the proposed action; the household's right to request a fair hearing; the telephone number and, if possible, the name of the person to contact for additional information; the availability of continued benefits; and the liability of the household for any overissuances received while awaiting a fair hearing if the hearing official's decision is adverse to the household. If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service.

out limitation. See 7 C.F.R. 273.9(d). (These figures are applicable to the lower 48 states and the District of Columbia.)

⁵ Congress now requires monthly reporting of household income by many food stamp recipients, and states make appropriate monthly benefit adjustments on the basis of those reports. 7 U.S.C. 2015(c). Congress has specifically permitted states to make adjustments based on information provided by the recipients without advance notice to the recipients. 7 U.S.C. 2020(e)(10) (last clause); see 7 C.F.R. 273.13(a)(3).

⁶ The first sentence quoted in text was inadvertently omitted in the current edition of the Code of Federal Regulations.

Another broad category of event that may affect a household's allotment of food stamps during its certification period is a change in the law to be applied. Such "mass changes" affect all certified households or defined classes thereof, and are calculated on the basis of the household data already on file.⁷ Federal regulations require that states implementing a mass change send notices to each affected household, no later than the implementation date of the change, advising them of the change in general terms. 7 C.F.R. 273.12(e)(2)(ii). The regulations further require that any food stamp recipient who believes that his allotment was erroneously calculated be afforded a hearing upon request. If a hearing is timely requested, the former level of benefits is to be restored until the recipient's complaint is acted upon, unless the complaint is based upon opposition to the underlying legal change. *Ibid.* The advance notice and content requirements applicable to "adverse actions" do not apply to mass changes. 7 C.F.R. 273.13(b)(1).

b. As with most federal welfare benefit programs, the Food Stamp program involves the application of factual data to the statutory and regulatory requirements. Although determinations of eligibility are generally less factually complex than those in other programs, some errors are inevitable. Accordingly, Congress and the Secretary have instituted certain measures to reduce the incidence of errors. Before an application for participation in food stamps is approved, the state must verify the information provided by the applicant household.⁸ Upon

⁷ Mass changes include statutory adjustments to the eligibility criteria or allowable deductions, adjustments in the benefits provided by other state and federal welfare programs, Social Security benefit changes, and "other changes in the eligibility criteria based on legislative or regulatory actions." 7 C.F.R. 273.12(e).

⁸ Gross nonexempt income, alien status, utility expenses, medical expenses, social security numbers, residency, and identity must be verified. Other verifications are optional. See 7 C.F.R. 273.2.

approval, the household receives notice of its level of benefits and period of eligibility. Recipients have the right to protest the allotment then, or at any time they have a disagreement.⁹ Recipients have an ongoing right to review the information in their case file, which must contain all information used by the state to compute benefit levels. See 7 C.F.R. 272.1(c)(2), 273.15(p) and 273.2.

To avoid continued use of data that may no longer be valid, a household's benefits are limited to a specified "certification period" of between one and twelve months, depending upon an administrative evaluation of the financial stability of the household. See 7 U.S.C. 2012(c); 7 C.F.R. 273.10(f)(3)-(6). To receive benefits beyond the certification period, the household must reapply, updating the relevant data in the file. 7 U.S.C. 2012(c), 2014(f) and 2015(c); see *Banks v. Block*, 700 F.2d 292 (6th Cir. 1983), cert. denied, No. 82-7015 (Oct. 31, 1983). If a previously undetected error to the recipient's detriment is uncovered, either upon recertification or in any other manner, full refund for up to one year is provided. 7 U.S.C. 2020(e)(11).

To reduce errors further, Congress recently added a system of incentives to reward states that are able to lower error rates—both overpayments and underpayments—by increasing the federal contribution for administra-

⁹ At the time of their initial application, and at least once per year at the time of recertification, food stamp recipients are notified, directly below their signature on the form, that:

You or your representative may request a fair hearing either orally or in writing if you disagree with any action taken on your case. Your case may be presented at the hearing by any person you choose.

DX H, III C.A. App. 292; see 7 C.F.R. 272.3(b)(1). See also DX L, III C.A. App. 308 (notice of fair hearing rights contained on Massachusetts eligibility determination form).

tive costs to 60%, or by reducing the federal contribution, as appropriate. 7 U.S.C. 2025(c) and (d).¹⁰

2. This case involves a change in the so-called "earned income disregard." To maintain an incentive to earn and report income, the Secretary adopted a policy of deducting or "disregarding" a portion of a household's earned income in making eligibility and benefit level determinations. Congress codified a 20% earned income "disregard" in the Food Stamp Act of 1977, Pub. L. No. 95-113, Tit. XIII, § 1301, 91 Stat. 963; see 7 U.S.C. (Supp. II 1978) 2014(e). Application of the disregard reduces a household's net income, thus easing eligibility and raising benefits above what they might otherwise be on a strict income calculation.

Section 106 of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 360, amended the Food Stamp Act to reduce the earned income disregard from 20% to 18%. See 7 U.S.C. 2014(e). As a result of this change, some participating households experienced a small reduction in their monthly food stamp allotment, some became ineligible for food stamps, and others were entirely unaffected.¹¹ We are advised that the reductions involved did not exceed \$6 per month for a four-member household if the household remained eligible for benefits. In some instances a household with relatively high income at the margin of eligibility prior to the enactment of OBRA was rendered ineligible as a result of the decrease in the earned income

¹⁰ The federal contribution may be reduced for error rates exceeding 9% for 1983, 7% for 1984, and 5% for 1985. 7 U.S.C. 2025(d).

¹¹ The reduction in the earned income disregard did not necessarily reduce the benefits of a household with earned income, especially if the household had relatively small amounts of earned income or a low food stamp allotment. As the amount of earned income increased, the reduction in the amount disregarded would generally increase as well, gradually reducing the food stamp allotment.

disregard. The record does not provide any breakdown on how the Massachusetts food stamp recipients were actually affected.

To implement Section 106 of OBRA, the Department of Agriculture issued regulations, 46 Fed. Reg. 44712 *et seq.* (Sept. 4, 1981), directing the states to effectuate the change in the earned income disregard by no later than December 30, 1982 (absent a waiver), and to provide notice to recipients in the manner prescribed for mass changes (*id.* at 44722). See 7 C.F.R. 273.12(e)(ii). The Massachusetts Department of Public Welfare implemented the change by means of an instruction to the Bureau of Systems Operation, a state agency that does computer work, to modify the computer program to lower the earned income disregard from 20% to 18% (see Pet. App. A73). The new disregard level was applied to the data on record for each recipient. No individual factual determinations were needed to implement the change.

Before the statutory change was put into effect, the Massachusetts Department of Public Welfare issued notices to food stamp households believed to be affected by the statutory reduction in the earned income disregard (Pet. App. A3). These notices explained the basis for the change and supplied relevant citations (*id.* at A44-A45). The notices informed the recipients of their right to appeal if they disagreed with the action, and stated that the reductions would not go into effect during the pendency of any appeal filed within 10 days of the date of the notice.¹² Recipients could appeal by signing and dating a form included with the notice and returning it to the address listed on the notice, or by requesting an appeal over the telephone or in person (*id.* at A45). The notices, however, were ambiguously dated "11/81" (*id.* at A4).

¹² In this respect, the Commonwealth's practice exceeded federal requirements. Cf. 7 C.F.R. 273.12(e)(2)(ii).

3. On December 10, 1981, four food stamp recipients brought this action in the United States District Court for the District of Massachusetts against the Commonwealth and the Secretary to challenge the validity of these notices on behalf of a class of approximately 16,500 households that had received the notices. The district court issued a temporary restraining order barring implementation of the statutory change in the earned income disregard.

The Commonwealth then took steps to moot any question arising from the ambiguity of the appeal deadline by issuing a second notice, dated December 26, 1981, and mailed on or about December 24. The first page of the December notice stated that the earlier notice had been withdrawn. The second page of the notice began "• • • IMPORTANT NOTICE—READ CAREFULLY • • •" and stated:¹³

RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. UNDER THIS LAW, THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL CITATION: 106 CMR: 364.400).

¹³ A photocopy of the December notice is reproduced at J.A. 4-5.

The notice then explained that the household had a "RIGHT TO A FAIR HEARING" and explained:

YOU HAVE A RIGHT TO REQUEST A FAIR HEARING IF YOU DISAGREE WITH THIS ACTION. IF YOU ARE REQUESTING A HEARING, YOUR FOOD STAMP BENEFITS WILL BE REINSTATED * * *. IF YOU HAVE QUESTIONS CONCERNING THE CORRECTNESS OF YOUR BENEFITS COMPUTATION OR THE FAIR HEARING PROCESS, CONTACT YOUR LOCAL WELFARE OFFICE. YOU MAY FILE AN APPEAL AT ANY TIME IF YOU FEEL THAT YOU ARE NOT RECEIVING THE CORRECT AMOUNT OF FOOD STAMPS.

As with the November notice, recipients were provided a card which they could mail to obtain a hearing; alternatively, they could obtain a hearing by placing a telephone call or asking in person.

After receiving this notice, plaintiff-respondents amended their complaint to attack its sufficiency. A renewed application for a temporary restraining order was denied by the district court, and the reductions required by OBRA Section 106 were effectuated for Massachusetts food stamp recipients beginning in January 1982.

On March 24, 1983, after a two-day trial, the district court ruled in favor of plaintiff-respondents and entered findings of fact and conclusions of law (Pet. App. A42-A98). The district court found that the "nature of the language" and the format of the notices rendered them "very difficult to understand especially considering the education level of most recipients" (*id.* at A96).¹⁴ The

¹⁴ The district court's finding is based upon the testimony of reading experts. According to the district court (Pet. App. A60, A64), the words and phrases that rendered the December notices difficult for some recipients to comprehend included: "within," "division," "recent," "federal," "benefit," "benefits," "eligibility," "eligible," "appeal," "reduced," "reduction," "deduction," "request,"

district court further found that the notices could have been written more simply, and could have been framed to state the former benefit level for the particular household, the new benefit level, "a precise statement of the reason for [and] the nature of the change, and sufficient information to allow its recipient to determine whether the proposed action is correct" (*id.* at A76).

The district court concluded (Pet. App. A88-A89) that the calculation of food stamp benefits, which "requires an individualized determination of income, expenses, and deductions for each recipient[,] * * * creates substantial risks of erroneous deprivation." The district court made no factual finding that the error rate was caused by implementation of the change in the earned income disregard.¹⁵ Indeed, none of the named plaintiffs suffered an erroneous deduction in benefits as a result of the statutory change (see *id.* at A50-A56).¹⁶ The court

"action," "local," "welfare," "percent," "disagree," "terminated," "computation," "contact," "enclosed," "current," "denied," "your right to a fair hearing," "reinstated," "the earned income deduction has been lowered from 20 percent to 18 percent," and "appeal is denied."

¹⁵ The only specific source of errors identified by the district court was the backlog in the computerized system for monthly reporting of income data (M.I.R.S.). Pet. App. A78-A80. Errors in income data would result in errors in food stamp allotments wholly without regard to any change in the earned income disregard. The court also inferred from an informal study by a law student working for plaintiff-respondents that there were persons with no earned income who received notices and/or changes in benefits (Pet. App. A82-A83). For reasons explained below (see note 26, *infra*), this study was not reliable.

¹⁶ Each of the named plaintiffs appealed his reduction in benefits; none identified a computational error resulting from the change in the earned income disregard. Cecilia Johnson's benefits were reduced as a result of an erroneous report of a change in income. Her benefits were continued at the prior level during an administrative appeal, which corrected the error. Pet. App. A50-A52. Gill Parker's "benefits were not reduced as a result of the

acknowledged (*id.* at A91) that “[i]t is unclear from the record the possible monetary loss to those households affected by the December notice.”

Invoking the procedural due process analysis outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the district court held that the notices issued by the Commonwealth were insufficient. The court reasoned that plaintiffs presented “extremely significant” private interests in securing food stamp benefits; that there was a substantial risk of erroneous deprivation of benefits that use of more complete notices could have reduced; and that these improvements could have been implemented without “any real hardship” to government interests (Pet. App. A86-A95). The district court also held that because of its format and difficult language, the notice did not reasonably convey the information it contained (*id.* at A96-A98). In addition, the district court held, without elaboration, that the Massachusetts notices violated the advance notice and content requirements applicable to “adverse actions” established by the Food Stamp Act and federal regulations (*id.* at A98).¹⁷

The district court directed the defendants to restore to every member of the class that had received the Massachusetts notice the amount by which his or her food stamp

challenged notices” (*id.* at A53). Stephanie Zades’ benefits were reduced, apparently in connection with a dispute over her eligibility for AFDC. After a hearing, her benefits were restored. Pet. App. A55. The reduction in Madeline Jones’ benefits was sustained on administrative appeal (*id.* at A55-A56). To the extent that there were errors in the food stamp allotments of the named plaintiffs, they were attributable to mistakes in underlying income data unrelated to changes in the earned income disregard. We assume (see Fed. R. Civ. P. 23(a)) that these claims are representative of the class.

¹⁷ The district court also found that the Massachusetts notice was in violation of the Department’s multi-lingual notice requirements, 7 C.F.R. 272.4(b)(3). That holding was not appealed, and only the question of remedy for that violation is before this Court.

benefits had been reduced in compliance with Section 106 of OBRA, for the period between January 1, 1982, and the date that the recipient household received sufficient notice, had its benefits terminated for an unrelated reason, or had its file recertified (Pet. App. A101). The court also permanently enjoined the Massachusetts Commissioner of Public Welfare from reducing or terminating the benefits of any food stamp recipient without providing 10 days’ advance notice containing at least the following information (*id.* at A103-A104):

- a. An explanation of the reason for the proposed action;
- b. The specific citation that supports the proposed action;
- c. The benefit amount prior to the proposed change;
- d. The benefit amount after the proposed change;
- e. Sufficient information to allow the recipient to determine whether an error has been made; and
- f. The effective date of the proposed action.

The Commonwealth was directed to submit for the court’s review and approval new regulations “containing specific standards to ensure that all future food stamp notices of reduction or termination are written and printed so as to be understandable to recipients of those notices” (*id.* at A102).

4. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A38). The court of appeals sustained the district court’s ruling that the Commonwealth’s notice of the implementation of the reduction in the earned income disregard was constitutionally deficient (*id.* at A11-A28). The court rejected the government’s argument that because the change in the earned income disregard was statutorily mandated, food stamp recipients could not claim any procedural due process rights respecting notice of its implementation (*id.* at A11-A14). The

court reasoned that unless a statutory entitlement program is entirely abolished, "people have the right to participate in accordance with" the "preestablished ground rules" and that the implementation of any statutory change in the program affecting the terms of participation is subject to procedural due process review under *Mathews v. Eldridge*, *supra* (Pet. App. A13-A14, A17). Subjecting the district court's application of the *Eldridge* factors to the clearly erroneous standard of appellate review (*id.* at A19-A20, A25-A26), the court of appeals declined to set aside the lower court's constitutional ruling (*id.* at A21-A25).

In addition, the court of appeals upheld the district court's ruling that the Commonwealth's notices violated the Food Stamp Act, 7 U.S.C. 2020(e)(10), and the Department of Agriculture's mass change regulations, 7 C.F.R. 273.12(e)(2)(ii), reasoning (Pet. App. A31): "[w]e doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement." The court of appeals reversed the district court's holding that the Massachusetts notice violated the Department's "adverse action" regulations, 7 C.F.R. 273.13(a). The court observed that 7 C.F.R. 273.13(b)(1) expressly exempts mass changes, such as that involved here, from the requirements of the adverse action regulations. Pet. App. A28-A29.

The court of appeals set aside the remedies ordered by the district court (Pet. App. A32-A38). The court stated (*id.* at A33 (emphasis added)) that the complete restoration of food stamp benefits at their former level to all recipients

was unwarranted, given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated. *Restoration of benefits would constitute a windfall to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress.*

Furthermore, because food stamp benefits are funded by the federal government, a remedy of "wholesale benefit restoration" would have the perverse effect of undermining the states' incentive to provide sufficient notice (*id.* at A34).

Although rectification of the notice deficiencies would ordinarily be the most appropriate remedy, the court of appeals observed that providing such additional notice after the statutory change had already been implemented might "merely confuse recipients" (Pet. App. A35). Accordingly, the court of appeals instead directed the Commonwealth to undertake a "thorough and accurate" review of the files of all members of the class and to correct any errors discovered (*id.* at A35-A37). Finally, because there was no indication that the Commonwealth had acted in bad faith or would issue deficient notices in the future, and had in fact issued valid notices in comparable situations in the past, the court of appeals concluded that "the district court placed an improper and unnecessary burden upon [the state agency] when it specified the form of future notices and required the submission and promulgation of new notice regulations" (*id.* at A38).

INTRODUCTION AND SUMMARY OF ARGUMENT

The courts below have held that the Due Process Clause precludes a state from implementing a congressionally-mandated adjustment in food stamp benefit levels without providing advance notice to all affected beneficiaries that includes particularized information about how the statutory change will affect them, in a format satisfying judicially-created rules on line spacing and length, capitalization, type size, and reading comprehension level.

Ostensibly, the purpose of this notice is to enable recipients to discover, and thus to challenge, any errors that may occur through implementation of the statutory change. In fact, however, the statutory change is accomplished by means of a simple alteration in the computer

program, with no more likelihood of error than exists any time changes are made or a computer run is conducted. Moreover, the current system has numerous safeguards against computational errors, including federal financial incentives for reducing error, periodic (at least annual) verification of all data, ongoing opportunities for any beneficiary to examine his file and to challenge inaccuracies, and (most pertinent) notice of statutory changes in general terms with a full explanation of how to obtain a fair hearing.

The imposition of additional notice requirements by the courts is more than a minor nuisance. Procedure—especially additional and unanticipated procedure—is not without cost. *Wheeler v. Montgomery*, 397 U.S. 280, 284 (1970) (Burger, C.J., dissenting). Over the years, Congress and successive administrations have consistently improved this program, balancing a complex of legitimate concerns: efficiency, accuracy, fairness, privacy, and cost. The courts below have intruded, quite unnecessarily, on the control of Congress and the Secretary over the administration of the Food Stamp program.

The courts' approach constitutionalizes details of administrative operation that are more appropriately left to program managers. Imposition of constitutional standards on such technical details as type size and reading difficulty, on a necessarily after-the-fact basis, makes it far more difficult for program managers to perform their duties on a common-sense basis without tripping over complex and ill-defined legal standards. As this case illustrates, legal requirements frequently must be implemented quickly, without the luxury the district court enjoyed of months of study and expert hindsight. Is it really so desirable that constitutional lawyers and linguistic experts must be consulted before a state can so much as send out a notice?

The approach taken below also interferes with Congress's ability to set the levels of food stamp benefits.

The courts below seem to have lost sight of the fact that Congress determined that a change in benefit levels should be made; neither the Commonwealth nor the courts have authority to countermand that determination. On the contrary, the courts have a "duty . . . to observe the conditions defined by Congress for charging the public treasury." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947). If needless and unanticipated notice requirements are imposed, the Commonwealth is prevented from complying with the statutory directive. Notice requirements should not be used as a weapon to delay or prevent implementation of the law.

Of course, if the notice standards imposed below were genuinely required as a matter of due process, the uncertainty and administrative disruption would have to be tolerated. However, in the case of arithmetic recalculations based on preexisting data, made necessary by a change in the governing statute, we believe that there is no constitutional requirement whatsoever of notice to affected persons (other than the notice all citizens receive through official statutory compilations and the Federal Register). It follows, *a fortiori*, that the notice actually provided here satisfied constitutional standards.

Even if some form of individual notice were constitutionally mandated, the notice actually provided by the Commonwealth was sufficient. There is no requirement that notice of a statutory change include a numerical quantification of how the change will affect each household. It is sufficient if the notice includes (as these did) a general statement of the nature of the change and an explanation of how to obtain a hearing. Nor is there any requirement that notices conform to expert analyses of reading comprehension levels, or to specific choices of typography. It is sufficient if the notice conveys accurate information in a manner reasonably designed to inform.

The court of appeals concluded, however, that the notices provided by the Commonwealth in this case were

constitutionally deficient. It rejected the argument that Congress may effectuate changes in welfare programs without providing advance notice, and upheld, on an erroneously deferential "clear error" basis, the district court's constitutional requirements regarding content and format. The court of appeals also concluded, in effect, that the statute governing the Food Stamp program incorporates this constitutional standard and, on that basis, that there was a statutory violation as well. We disagree with each of these conclusions. Ordinarily, we would address the statutory argument first.¹⁸ However, because the court's statutory argument follows solely from its constitutional argument, we will address the latter first.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT REQUIRE INDIVIDUALIZED ADVANCE NOTICE OF LEGISLATIVE REDUCTIONS IN WELFARE BENEFIT LEVELS

A. Congress Has The Authority To Modify Benefit Levels Without Providing Affected Persons Notice And An Opportunity To Comment

This is not a case like *Goldberg v. Kelly*, 397 U.S. 254 (1970), or *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which an individual's benefits are terminated or reduced as a result of the government's (possibly erroneous) conclusion that factual circumstances have changed. In such an instance, the individual has a "legitimate claim of entitlement" (*Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9, 12 (1978) (citations omitted)) to the benefits, and a concomitant constitutional right to pro-

¹⁸ The Commonwealth did not specifically raise the statutory question in its petition for a writ of certiorari. However, since the court of appeals' statutory holding has no support or basis independent of its constitutional holding, we consider it fairly subsumed within the questions presented.

cedural protections appropriate to determining whether, on the facts, his claim should prevail.

Here, the food stamp benefits of the respondent class have been reduced (and in cases on the margin of eligibility, terminated), not on the basis of any debatable change in factual circumstances, but because Congress has amended the law. Respondents have no "legitimate claim of entitlement" to any benefits in excess of those voted by Congress, and accordingly, no liberty or property interest in continuation of the prior benefit level that would call for notice or an opportunity to be heard.¹⁹ *Benton v. Rhodes*, 586 F.2d 1 (6th Cir. 1978), cert. denied, 440 U.S. 973 (1979); *Russo v. Kirby*, 453 F.2d 548, 551 (2d Cir. 1971).²⁰

¹⁹ The court of appeals concluded that recipients have a property interest in participating in a welfare program "in accordance with preestablished ground rules" (Pet. App. A14). We do not agree. Congress has the authority at any time to change the "ground rules" of a noncontractual welfare program, and recipients have no right of any kind to continued benefits under the "preestablished" rules. See, e.g., *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174 (1980); *Flemming v. Nestor*, 363 U.S. 603, 608-611 (1960).

²⁰ Accord, *Ohio State Consumer Education Ass'n v. Schweiker*, 541 F. Supp. 915, 920 (S.D. Ohio 1982); *Seniors United for Action v. Ray*, 529 F. Supp. 55, 59 (N.D. Iowa 1981); *Whitfield v. King*, 364 F. Supp. 1296, 1301-1302 (M.D. Ala. 1973) (three-judge court), modified, 399 F. Supp. 348 (1975), aff'd summarily, 431 U.S. 910 (1977); *Merrinweather v. Burson*, 325 F. Supp. 709, 710-711 (N.D. Ga. 1970), aff'd in relevant part, 439 F.2d 1092 (5th Cir. 1971); but see *Philadelphia Welfare Rights Organization v. O'Bannon*, 525 F. Supp. 1055 (E.D. Pa. 1981). These are to be distinguished from cases in which welfare benefit changes are made on the basis of changes in the recipient's individual circumstances, e.g., *Dilda v. Quern*, 612 F.2d 1055 (7th Cir.), cert. denied, 447 U.S. 935 (1980); *Basel v. Knebel*, 551 F.2d 395 (D.C. Cir. 1977), and from those in which the implementation of statutory changes requires individual factual determinations, e.g., *Garrett v. Puett*, 707 F.2d 930 (6th Cir. 1983); *Banks v. Trainor*, 525 F.2d 837 (7th Cir. 1975), cert.

There is a fundamental difference between welfare payment reductions legislated by Congress and those initiated by welfare officials on factual grounds. In the former case, the rights of affected parties—be they taxpayers or beneficiaries of the program—are in the political arena. Citizens have the right to vote, to speak out, and to petition for redress of grievances. But they have no right to particularized notice or an opportunity to be heard regarding their reactions to legislation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-433 (1982); *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 799-800 (1980) (Blackmun, J., concurring); *Bi-Metallic Investment Co. v. Colorado*, 239 U.S. 441 (1915). Food Stamp recipients, no less than other Americans, are charged with constructive knowledge of statutory changes that affect them and, through the Federal Register, have notice of the implementing regulations. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. at 384-385. The enforceability of Acts of Congress does not depend upon whether affected persons have actual notice of them. *INS v. Hibi*, 414 U.S. 5, 8 (1973); see *Heckler v. Community Health Services of Crawford County, Inc.*, No. 83-56 (May 21, 1984). Congress may, but need not, provide for additional notice of statutory changes; without any notice at all, Congress may make changes in welfare levels and implement them immediately.

Only when benefits are cut as a result of disputed factual issues do due process requirements of notice and hearing arise. *Codd v. Velger*, 429 U.S. 624, 627 (1977); *Goldberg v. Kelly*, 397 U.S. at 268.²¹ Then, it may fairly

denied, 424 U.S. 978 (1976); *Willis v. Lascaris*, 499 F. Supp. 749 (N.D.N.Y. 1980). In this case, it is not necessary to address the difficult problems raised by the latter class of cases.

²¹ In *Goldberg v. Kelly*, the Court explained that the rights of notice and hearing "are important in cases * * * where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or

be said that a protected property interest is at stake, calling for a flexible due process analysis in which the private and public interests, and the nature of the procedure sought, are considered and weighed. *Mathews v. Eldridge*, 424 U.S. at 335; see *Arnett v. Kennedy*, 416 U.S. 134, 166 (1974) (Powell, J., concurring). This Court has made clear, however, that the "analogy drawn in *Goldberg* between social welfare and 'property,' cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (citation omitted).

This distinction is reflected in the statutory and regulatory notice and hearing requirements applicable to the Food Stamp program. In general, fact-specific reductions, called "adverse actions," cannot be made without "individual notice" and an opportunity for a "fair hearing and a prompt determination thereafter." 7 U.S.C. 2020(e) (10). The Department's regulations provide that the notice must be sent at least 10 days in advance of the proposed action, and must include information on the proposed action, the reason for the action, the right to a fair hearing, the availability of continued benefits, and sources of further information and legal assistance. 7 C.F.R. 273.13(a)(2) (1983).²²

In contrast, no notice or hearing procedures are prescribed by statute in the case of across-the-board legislative or regulatory changes in benefit levels or eligibility criteria, called "mass changes." In 1971, in response to *Goldberg v. Kelly*, Congress adopted the "adverse action" procedures discussed above, but understood that a hear-

policies to the facts of particular cases" (397 U.S. at 268 (footnote omitted)). Since such factual and legal judgments are by their nature debatable, a hearing is in order. The same is simply not true of arithmetic calculations; one does not debate sums and products.

²² But see note 5, *supra*.

ing was not required in advance of a reduction if the issue was one of law "and is not a matter of fact or judgment relating to an individual case." H.R. Rep. 95-464, 95th Cong., 1st Sess. 286 (1977). In 1977, Congress legislated against the backdrop of the Secretary's regulations, and stated its understanding that those regulations "do not require individual notice of adverse action when mass changes in [the] program" are implemented. *Id.* at 289.²³

By regulation, the Secretary has required that states implementing mass changes must send notices no later than the implementation date to affected households, advising them of the reason for the change in general terms. 7 C.F.R. 273.12(e)(2)(ii). The particularized information required of adverse action notices is not required of mass changes. 7 C.F.R. 273.13(b)(1).

This general notice of mass changes has been instituted as a matter of regulatory policy because it enables households better to adjust their budgets to the changes (43 Fed. Reg. 18896 (May 2, 1978)). Notice also eases the administrative burden on the states because it should "reduce the amount of client visits and phone calls to the agency seeking clarification, reduce the amount of unnecessary appeals, and free up the time of the caseworkers for other tasks" (Pet. App. A76-A77). However, since the relevant decision in the case of an across-the-board statutory change has already been made by Congress, there is no occasion for a hearing on the change (as opposed to a hearing on other factual issues that may be revealed at the time of the change).

²³ The House Committee urged the Department, notwithstanding its usual practices, to require the states to send notices of "the massive changes" in the 1977 legislation, "so that the individuals affected are fully aware of precisely why their benefits are being adversely affected." H.R. Rep. 96-464, *supra*, at 259. The Committee recognized that "[h]earings would, of course, be unnecessary in the absence of claims of factual error in individual benefit computation and calculation" (*ibid.*).

One way of illustrating the fallacy in the reasoning below is to ask what sort of hearing on the change in the earned income disregard Massachusetts welfare officials could have given. It was not in their power to countermand the decision of Congress; their only choice was to affirm the resulting changes in benefits. The Constitution surely does not require that the states go through the charade of a hearing when they lack the authority to influence the outcome. And if there is no basis for a hearing, there can be no constitutional requirement of notice. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. at 14.

As the court of appeals recognized (Pet. App. A29), the changes involved in this case fall within the category of "mass changes"—those for which there is no constitutional requirement of notice or an opportunity to be heard. It therefore follows that, even if the notices were uninformative, they still exceeded constitutional minima.

B. The Risk Of Computer Miscalculation Of Revised Benefit Levels Does Not Necessitate Advance Individualized Notice

The only plausible argument for requiring advance notice of statutory changes in benefit levels is that there is a risk that benefits would be miscalculated as a result of the change. See *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979). Indeed, the court of appeals found that the reason for requiring individualized notice in this case was the district court's purported conclusion that "there was a high likelihood that recipients' benefits would be miscalculated as a result of the statutory change in the earned income deduction" (Pet. App. A21). In theory, the advance individualized notice would enable recipient households to identify miscalculations and obtain corrections before the errors were put into effect.

We submit, however, that the possibility of inadvertent errors does not, in itself, constitute a deprivation of prop-

erty such that advance notice and hearing procedures are required before statutory changes can be implemented. And even if some procedural protections are constitutionally required in certain error-prone circumstances, in cases of this sort, where the change is purely arithmetic, the risk of serious error is negligible. Extension of the principle of the decision below would embroil the federal courts in vast numbers of ministerial acts that presently are performed without controversy or litigation. Thus, even treating the recipients' interest here as a property interest entitled to due process protections, there was no constitutional requirement that Massachusetts issue an individualized notice to affected households in advance of the change.

1. Elimination of errors in food stamp calculations is a worthy goal, one that the federal government, the states, the recipients, and the taxpayers all share. Under recent legislation, Congress has introduced substantial financial incentives to induce the states to find means of reducing their food stamp error rates, both overpayments and underpayments. 7 U.S.C. 2025(c) and (d). The principal weapon against errors is the certification and recertification process, whereby all key information is reviewed and updated by recipients, and verified by the states, at least once a year and in many cases more often. This is a protection both for the recipient and for the fisc. Recipients also have an ongoing right to inspect all information relevant to their benefit determinations, and, from the time of their original application, have been on notice that they may challenge the accuracy of their allotments at any time. Errors, if any, are promptly corrected, and any underpayments for the previous year are refunded. See pages 5-7, *supra*. The Food Stamp program is a model of administrative fairness and concern for accuracy.

Unfortunately, in this as in any complex program, there will be errors. The Commonwealth's best estimate was that there were errors in food stamp allotments in 13%

of its cases in 1980—11% being *overpayments* and 2% being *underpayments* (Pet. App. A77). Inadvertent errors of this sort are a perennial problem of welfare administration. But they do not warrant judicial intervention under the Due Process Clause. As this Court has stated, "the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations." *Mackey v. Montrym*, 443 U.S. 1, 13 (1979); see *Greenholtz*, 442 U.S. at 7. All that is required is that the procedures used be "designed to provide a reasonably reliable basis" for the actions taken. *Mackey*, 443 U.S. at 13; see *Barry v. Barchi*, 443 U.S. 55, 64-65 (1979).

Judicial intervention under the Due Process Clause is simply not required to prevent the ordinary incidence of inadvertent error in administration of a government assistance program. In the Food Stamp program, like Social Security, "the administrative goal is accuracy and promptness in the actual allocation of benefits * * *. Fairness can best be assured by Congress and the [Secretary] through sound managerial techniques and quality control designed to achieve an acceptable rate of error." *Califano v. Boles*, 443 U.S. 282, 285 (1979). See also *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982).

In comparable circumstances this Court has held that due process does not require an advance hearing merely to call "[c]lerical errors and deficiencies" to the attention of the authorities. The ordinary internal controls of the government agencies involved are generally sufficient to "minimize [this] type of error." *Mackey v. Montrym*, 443 U.S. at 16. Similarly, here, any error in the computer program would affect large numbers of recipients, and would likely be detected—and corrected—promptly. In-

deed, the only computer programming error identified in connection with the Massachusetts Food Stamp program as occurring during the time of the events of this case—an error in the calculation of the \$10 minimum benefit for certain households with no earned income—was discovered by the Commonwealth itself and corrected during the next monthly benefit period. J.A. 49. 250.

And even if the Commonwealth were not to uncover an error itself, the error would be corrected for all affected individuals upon being brought to the Commonwealth's attention by any one of them, with corrective payments to all. The availability of prompt and full redress for any error makes individual advance notice and hearing procedures all the more unnecessary. *Barry v. Barchi*, *supra*; *Mackey v. Montrym*, 443 U.S. at 12, 15; *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975). See also *Parratt v. Taylor*, 451 U.S. 527 (1981) (post-deprivation remedy sufficient for inadvertent and unauthorized deprivation of property).

It is absurd to suggest that notice and hearing procedures, which are designed "to ensure the accurate determination of decisional facts, and informed, unbiased exercises of official discretion" (*O'Bannon v. Town Court Nursing Center*, 447 U.S. at 797 (Blackmun, J., concurring) (emphasis added)), should be transposed to the field of across-the-board, ministerial calculations. The process that is "due" where disputed factual issues are determinative is simply out of place when all that is left is to add, subtract, multiply, or divide. It is as if appellee Kelly, of *Goldberg v. Kelly*, had insisted upon two hearings—one to resolve the factual question at issue, and a second to check the State's subsequent arithmetic calculations. A state is compelled, we agree, promptly to correct any arithmetic errors that are brought to its attention; that is all, however, that due process demands in such a case.

2. In any event, the potential for error stemming from the statutory change involved in this case was ex-

ceedingly slim. The nature of the "decision" was wholly ministerial, with no "issues of witness credibility and veracity" that would ordinarily trigger the need for notice and hearing. *Mathews v. Eldridge*, 424 U.S. at 343-344 (distinguishing *Goldberg v. Kelly*, *supra*). And the decisionmaking function—the computer program—was performed by disinterested professionals rather than by persons acting as "advocate or adversary." *Richardson v. Perales*, 402 U.S. 389, 403 (1971). The state food stamp officials who implement congressional policy "ha[ve] every incentive to ascertain accurately and truthfully" the level of recipients' benefits. *Mackey v. Montrym*, 443 U.S. at 14. Accordingly, the risk ordinarily averted by due process procedures—of government arbitrariness or unfairness—is nonexistent here. Individualized notice and hearing is an awkward and cumbersome way to improve the accuracy of across-the-board computations that affect thousands of persons in the same way. *O'Bannon v. Town Court Nursing Center*, 447 U.S. at 799-801 (Blackmun, J., concurring).

The change from a 20% to an 18% earned income disregard was accomplished by means of a simple instruction to the computer. If the computer was correctly programmed, all of the benefit calculations would be correct. If there were an error in the program, it would affect all (or at least broad classes of) recipients with earned income, and would be promptly discovered. In actuality, we strongly suspect that the computer program here was correctly entered and that there were no errors resulting from the change in the earned income disregard.

The court of appeals acknowledged that this view is "appealing in theory" (Pet. App. A23), but nonetheless deferred to the district court's supposed finding "that there was substantial risk of calculation error" (*ibid.*). It is therefore necessary to examine the district court's factual findings in some detail. When we do so, it is evident that the district court failed to distinguish be-

tween errors resulting from the change in the earned income disregard and those resulting from other causes, and that its conclusions regarding error rates are essentially irrelevant to the question at hand.

The district court began by noting (Pet. App. A77) that the Commonwealth's food stamp error rate was about 13%. This error rate includes, however, all errors resulting from faulty data in the system; it does not suggest that the performance of a simple arithmetic calculation by computer would be prone to error. The court then pointed out (Pet. App. A78) that some 9,191 of the households affected by the change in the earned income disregard were participants in the monthly income reporting system (M.I.R.S.), a new system that provides continuous computerized tracking of changes in recipients' monthly income, and that in October through December 1981, there was a backlog in the M.I.R.S. Since the earned income disregard is calculated on the basis of monthly income, the court concluded that "the likelihood of error with respect to any M.I.R.S. household affected by the change in the earned income disregard was increased" (Pet. App. A80).

This conclusion, however, has no bearing on whether the change in the earned income disregard introduced any errors. Admittedly, if the income data in the system with respect to any household were inaccurate for any reason (including but not limited to problems with M.I.R.S.), that household's computed food stamp allotment would likely be incorrect. But this would be true *whether or not there were a change in the earned income disregard*. Providing notice of a change in the earned income disregard would be totally irrelevant to the correction of any errors caused by a backlog in M.I.R.S.²⁴

²⁴ The court of appeals simply failed to recognize the significance of this point. That court stated (Pet. App. A24):

The recipients in this case, who were advised only that their benefits would be reduced or terminated, had no way of know-

The district court then recited the findings of a so-called "random sample" of households that received the December 1981 notice (Pet. App. A80-A83). According to a study of this sample conducted by a law student working for plaintiff-respondents, some 585 households (out of 5,013 studied) received notices even though they had no earned income; of them, 211 were listed as experiencing a change in benefits. In addition, some 13 households were listed as having income but no change in benefits. Other than declaring these to be instances of "error" (Pet. App. A82-A83, A89-A90), the district court did not explain the significance of these findings or draw any explicit conclusions from them.

The error rate deducible from this study (4.2%—211 out of 5,013)²⁵ is quite low, especially considering the

ing whether their benefits had been correctly computed or whether an error had been generated by the use of inaccurate or out-dated data. Moreover, this was a very confusing time for many of the recipients owing to concomitant changes in other federal assistance programs. Given these circumstances it was not unreasonable for the district court to conclude that the December notice was inadequate.

The question before the district court was whether implementation of the change in the earned income disregard was likely to generate an unacceptable level of errors; for purposes of this case, it did not matter whether recipients could discover errors attributable to other causes, such as "inaccurate or out-dated data." See *Merriweather v. Burson*, 325 F. Supp. 709, 711 (N.D. Ga. 1970), *aff'd* in relevant part, 439 F.2d 1092 (5th Cir. 1971). And even if there were temporary problems associated with the switch to M.I.R.S. or stemming from the other welfare changes being made at that time, we fail to see how they could form the basis for general due process standards. "The specific dictates of due process must be shaped by 'the risk of error inherent in the truthfinding process as applied to the generality of cases' rather than the 'rare exceptions.'" *Mackey v. Montrym*, 443 U.S. at 14 (quoting *Mathews v. Eldridge*, 424 U.S. at 344).

²⁵ We disregard the remainder of the 585 households, which received a notice but whose benefits were unchanged. Although sending them a notice (if the Commonwealth did so, see note 26,

fact that the law student who conducted the study included *increases* in benefits as well as *decreases* in his calculations (II C.A. App. 74-75). Even to draw this conclusion, however, rather stretches the reliability of the study. It is now established that the student's "random sample" included a large number of households that did not belong in the sample.²⁶ That error renders the study useless for purposes of this case. Moreover, among the 211 households with changes in benefits but no earned income were some who were affected by an unrelated error in the treatment of the \$10 minimum benefit for certain households without earned income, but with substantial unearned income.²⁷ This error was promptly

infra) may have been "error," it did not result in injury to anyone. The existence of 13 households with earned income but no change in benefits was not necessarily "error" at all (see note 11, *supra*), and the households certainly were not injured even if it was.

²⁶ The study was performed using selected pages from a computer printout called the "902 C Report." That was the Commonwealth's report on households with earned income, which were affected by the change (Pet. App. A80; J.A. 62, 250). We are informed that some 17 pages from a different report—the "902 B Report," which is the Commonwealth's report on households that were recalculated but received no change (*ibid.*)—were inadvertently included in the sample. (The fact that pages from the 902 B Report were included in the sample is demonstrated by the two representative pages introduced into the record and printed in the joint appendix (J.A. 43, 44). One of the pages (J.A. 44) is marked as "error code C." This indicates that the page is from the Commonwealth's 902 C Report. The other page (J.A. 43) is marked as "error code B"; it is from the 902 B Report.) Including 902 B households in this study was an error; it would be like including data on a group of Great Danes in a study of heartworm rates among Pekingese.

²⁷ Two of the 211 households appear on the representative pages in the record; the error in both cases is of this variety. See J.A. 44. Plaintiff-respondents have stipulated that the representative pages contain an example of each type of error found in the entire study. III C.A. App. 304. No other sources of error reflected in the study have been identified in this litigation. It is therefore highly probable that the miscalculation of the minimum benefit

corrected (J.A. 49, 250), and, though it was reflected in the study, is not relevant to this case.²⁸

The court of appeals was apparently uncomfortable about reliance on this study. It stated only that the district court "may have been influenced" by it (Pet. App. A25) and that "[w]e repeat this finding only to demonstrate that a number of errors did occur, the simple ministerial nature of the change notwithstanding" (*ibid.*). We believe that the study demonstrates no such thing. More to the point, the study revealed no instance (and by its structure, could not logically reveal any instance) in which any recipient's benefits were miscalculated as a result of the change in the earned income disregard.²⁹ We consider it significant that the district court could not identify a single individual whose benefits were erroneously computed as a result of the change.

accounts for all of the 211 households with no earned income whose benefits were reduced. This error, of course, has nothing to do with the reduction in the earned income disregard.

²⁸ We are therefore baffled by the district court's somewhat cryptic statement that "[t]he random sampling of the 902 C report only identified errors which logically flowed from the fact that the reductions or terminations of benefits were based upon a change in the earned income disregard" (Pet. App. A82).

The court of appeals made no reference to this finding of the district court, and may simply have disregarded it as confusing or internally inconsistent (as it is). If the statement has any bearing on the case, our position is that it is clearly erroneous.

²⁹ It is not logically possible for a change in the percentage of earned income disregarded to have affected households with no earned income. Eighteen percent of zero—like 20%—equals zero. If the computer erroneously identified a household as one with earned income for purposes of sending a notice, it merely alerted the household either that some other source of income (*e.g.*, disability benefits) had, when reported, been erroneously listed as earned income, or, if the household formerly had earned income, that no data entry was made when the earned income source ended. In either event, the error would have stemmed from the original data entry (or nonentry), not from the recomputation of benefits as a result of the statutory change.

Perhaps most to the point, none of the named plaintiffs, who are by definition typical of the class they represent (see Fed. R. Civ. P. 23(a)), suffered any erroneous deprivation as a result of the change. See note 16, *supra*.

Nonetheless, the court of appeals relied on the district court's supposed factual finding that "there was a high likelihood that recipients' benefits would be miscalculated as a result of the statutory change in the earned income deduction" (Pet. App. A21).³⁰ But the district court made no such factual finding. The district court simply found that the Commonwealth's base error rate was 13% (*id.* at A77), that the M.I.R.S. backlog "increased" the probability of error with respect to households subject to the statutory change (*id.* at A80), and that it was "error" for the Commonwealth to send the December 1981 notice to households with no earned income, to change the benefits of the 211 households with no earned income, and to send the notice to 13 households with earned income but no change in benefit level (*id.* at A83). The district court made no finding that the risk of error *resulting from the change in the earned income disregard* was "substantial." The relevant conclusion of law was framed as follows (Pet. App. A88-A89 (citations omitted)):

The calculation of food stamp benefits under the income method requires an individualized determina-

³⁰ Throughout this proceeding, the court of appeals applied the "clear error" test of Fed. R. Civ. P. 52(a) to mixed questions of law and fact (Pet. App. A19-A20). Having decided that the district court applied the correct legal standard (the *Mathews v. Eldridge* test), the court of appeals virtually abdicated its responsibility to scrutinize the district court's application of that test to the facts of this case. This was error, as a subsequent decision of this Court has established. *Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246 (Apr. 30, 1984), slip op. 15. This application of an erroneous standard of review would be sufficient reason for this Court to vacate the judgment below. We urge the Court to reach the merits of the case, however, and brief the case on the assumption that it will.

tion of income, expenses, and deductions for each recipient. This type of calculation creates substantial risks of erroneous deprivation.

To the extent that the "substantial risks of erroneous deprivation" relied on by the district court were due to "individualized determination[s] of income, expenses, and deductions for each recipient," those risks are irrelevant to the arithmetic implementation of an across-the-board change in the earned income disregard. It is difficult to understand how the court of appeals could have sustained the district court's holding on the basis of this irrelevant conclusion.

3. The consequences of the holding below would be far-reaching, and would embroil the federal courts in details of administration of vast numbers of ministerial acts. The risk of error from a computer program changing the earned income disregard from 20% to 18% is comparable to the risk any time a computer is used to make a calculation. It might as easily be argued that taxpayers have a right to notice and a hearing every time their income tax withholding is changed as a result of tax rate modifications, or that government employees must be given enough information to double-check their new pay level before a cost-of-living adjustment can be made.

Another example readily at hand is the adjustment of monthly food stamp benefits in response to recipient-reported changes in monthly income. Such changes are no less susceptible to computer error than the calculation involved here. Indeed, since they involve numerous individual calculations, they are clearly more so. Yet Congress has specifically provided that they can be made *without* any advance notice to the recipients. 7 U.S.C. 2020(e)(10) (last clause). Congress made the judgment that prompt effectuation of changes in food stamp entitlements, in cases where there is no dispute over the underlying facts (since they were provided by the recipient

himself), outweighs any need for advance notice and hearing. S. Rep. 97-504, 97th Cong., 2d Sess. 54-55 (1982). The same interests obtain here.

It is difficult to see a limiting principle in the judgment below. Since computer errors could theoretically be generated whenever a program is modified, notice would be equally required when benefits are *increased* as when they are cut; and since the errors could theoretically infect the allotments of any or all food stamp recipients, whether or not the change would apply to them if properly implemented, the notice would have to be sent to *all* program participants, not just those intentionally affected by the change.

The point is that the change in this case was thoroughly routine and ministerial, not unlike changes made—without notice, without question, without problem—in thousands, perhaps millions, of instances every month in every state. As the First Circuit recognized in an earlier decision in a similar case, *Velazco v. Minter*, 481 F.2d 573, 577-578 (1973):

the worst fate that could have befallen a recipient would have been a short-term deprivation based on human and/or computer error. The recipient would then have been essentially in no worse a position than if there had been a mistake, human or mechanical, in sending out his regular check. * * * * * There are no questions of credibility, no secret accusers, no personal bias. There is only the question of whether a mathematical formula was correctly applied to a particular amount.

If advance notice is required here, where risk of error is so exceedingly slim, it must be required in all comparable situations. The nation will be awash with notice, and no one will be the better off for it.

II. EVEN ASSUMING SOME DUE PROCESS PROTECTIONS ARE REQUIRED, THE MASSACHUSETTS NOTICE, COUPLED WITH THE OTHER PROCEDURES FOR REDUCING THE RISK OF ERROR, WAS CONSTITUTIONALLY SUFFICIENT

If Massachusetts could, consistent with due process, implement the statutory change in the earned income disregard with no individual notice at all, then no further argument is needed. But there exists a narrower ground for decision, because in fact, pursuant to federal regulation, the Commonwealth provided advance notice to all food stamp recipients affected by the statutory change. They were informed that the earned income disregard had been reduced from 20% to 18% and thus that their benefits might be reduced or terminated. They were told to contact their local welfare office if they needed more information. They were reminded that they had a right to a fair hearing on these changes, and they were told (and here Massachusetts went beyond federal requirements) that if they requested such a hearing, their benefits would remain at the former level during its pendency. Accordingly, even if the courts below were correct that notice of the changes was required, we submit that the notice actually supplied was constitutionally sufficient.

It is not clear what standard is the most appropriate for evaluating the sufficiency of notice under the Due Process Clause. The court of appeals applied the familiar three-factor test of *Mathews v. Eldridge*, *supra*, a general approach to deciding whether additional procedural protections should be afforded. On the other hand, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court employed a standard more specifically directed to the sufficiency of notice. In *Memphis Light, Gas & Water Division v. Craft*, *supra*, moreover, the Court did not apply the *Eldridge* analysis to the notice issue; it applied *Eldridge* only to the ques-

tion of a hearing.³¹ Accordingly, we will follow that example, and will principally rely on the precedents of *Memphis Light and Mullane*, with reference to *Eldridge* only where pertinent.

Nonetheless, our argument can be reformulated in terms of the analytical categories of *Eldridge*. The disruptive effect on government interests (see *Eldridge*, 424 U.S. at 335, 347-348) has already been discussed (see pages 16-17, *supra*). The scant risk of erroneous deprivations from implementation of this ministerial change under existing procedures and the probable disutility of additional detailed requirements on the content and format of notice (see *Eldridge*, 424 U.S. at 335, 343-347) has also been touched on (pages 24, 26-33, *supra*) and will be the principal focus of the discussion that follows. Finally, we agree that "the private interest that will be affected by the official action" (*Eldridge*, 424 U.S. at 335) is significant here, though clearly less significant than the termination of disability benefits in *Eldridge* or of welfare benefits in *Goldberg v. Kelly*.³² Even if the

³¹ Use of the *Eldridge* analysis to evaluate notices may be somewhat problematical because in hindsight it will often be possible to say that a better, clearer notice could have been given with no injury to governmental interests. The difficulty for the government commonly arises not so much from the specific requirements imposed by the court, but from the government's inability to anticipate what requirements might be imposed, and from the resultant interference with the program.

³² In contrast to the terminations of benefits at issue in *Goldberg v. Kelly* and *Mathews v. Eldridge*, this case involves, for most recipients, only a modest (at most, \$6 per month per four-person household) reduction in benefits. (Only comparatively well-off households at the margin of eligibility were terminated as a result of the change.) It is significant, also, that the earned income disregard constitutes an addition to benefits above what they would be under a strict comparison of income and food costs; a principal purpose of the disregard is to introduce an incentive to earn and report income. See H.R. Rep. 95-464, 95th Cong., 1st Sess. 60-62 (1977). To decrease a work incentive is not the same as denying the basic necessities of life. See *Pet. App. A88*; cf. *Goldberg v. Kelly*, 397 U.S. at 264.

Eldridge factors are applied, therefore, the same conclusion would be reached: the Massachusetts notice was constitutionally sufficient.

The contrary holdings of the courts below were based on two purported deficiencies in the notice: deficiencies of content and deficiencies of format.³³ We shall address each in turn.

A. Recipients Are Not Constitutionally Entitled To A Numerical Quantification Of The Effect On Them Of A Statutory Change In Benefit Levels

In affirming the district court's finding of a constitutional violation, the court of appeals apparently agreed that a notice of statutory changes in benefit levels must, as a matter of due process, contain "the individual recipient's old food stamp benefit amount, new benefit amount, or the amount of earned income that was being used to compute the change," and state whether the consequence of the change would be a termination or a reduction in benefits (*Pet. App. A100*).

As explained at page 6, *supra*, all data relevant to a recipient's benefits are available for inspection during every business day, if the recipient has any questions or doubts. Welfare caseworkers are also available to assist or answer questions. And recipients are perforce informed of actual benefit levels when they receive their monthly allotments a few weeks after the notice. This

³³ The district court's order also stated that the December notice was constitutionally deficient because "[i]t was not timely" (*Pet. App. A100*). No further explanation or elaboration was provided in the order or the accompanying opinion, and the court of appeals did not address the timeliness issue. If this Court were to hold that some notice was constitutionally required, but to reject the lower courts' findings of deficiencies in content and format, it might be appropriate for plaintiff-respondents to raise the timeliness issue on remand, assuming a justiciable controversy still exists at that time.

case thus concerns the narrow question whether recipient-specific information—readily available through other means—must be included as part of the notice.

It may make sense to require notice of particularized information where a change in benefits is to be made on that basis. In such cases, the recipient will be able to check whether the information is correct, and if it is disputable, to challenge it. Here, however, the change is the result of across-the-board legislative action; there is no new underlying information for the recipient to check. The information the district court would have the Commonwealth supply would be of little value to the recipient in detecting errors resulting from the statutory change; all he could do would be to check the computer's arithmetic.

Given the ministerial nature of the decision, there is so little risk of arbitrariness or error that the process provided—notice of the change in general terms and an opportunity for further information and a hearing—surely meets or exceeds constitutional standards.

In any event, the Massachusetts notice contained all the information necessary to enable a recipient to protect his rights. This Court has stated that “[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing.” *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. at 14 (footnote omitted). The Massachusetts notice apprised affected food stamp recipients of their right to a fair hearing and how to obtain it. It further advised them of sources of additional information. All the file data pertinent to the recipients’ benefit determinations are freely available to them. It is not necessary for that information to be physically conveyed to each recipient in an advance notice, at least where the benefit reductions are on an across-the-board, not a fact-specific, basis.³⁴

³⁴ Even in *Memphis Light*, a case involving termination of utility services on a fact-specific basis, this Court did not suggest that the

B. The Due Process Clause Does Not Dictate Type Size, Capitalization, Line Length Or Spacing, Or Reading Difficulty Of Notices.

The court of appeals affirmed the district court’s conclusion that the “form” of the notice provided by the Commonwealth “was constitutionally inadequate owing to its unfamiliar language, poor composition, small print, exclusive use of capital letters, and excessive line length” (Pet. App. A18). This holding is without basis in the Constitution.

The Constitution does not mandate notice of a type or quality that would be approved by linguistic experts. Rather, notice “must be of such nature as reasonably to convey the required information.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314. This is not a technical standard; it is not a delegation of authority to district courts (with the assistance of reading experts) to select type size, line length or spacing, or wording.

We can all applaud the movement toward plain English in public documents, and certainly, as the district court pointed out (Pet. App. A94-A95), it is in the interest of the government as well as the food stamp recipients to provide information in a clear and understandable manner. To recognize the desirability of clearer, simpler notices is not, however, to approve of constitutional litigation as the vehicle for reform. We can think of few enter-

utility’s notice to customers of a proposed termination had to include information specific to the recipient concerning the factual details of his case. A simple notice of the proposed action, with information about how to obtain a hearing, was all that this Court required. Surely no more is needed here, where the benefit reduction is merely the implementation of an across-the-board, statutory change. Cf. *Richardson v. Perales*, 402 U.S. at 407 (notice provided of proposed action; specific information on the basis for the action was “on file and available for inspection by the claimant”); *Goldberg v. Kelly*, 397 U.S. at 268 (generalized notice adequate where a caseworker is available to discuss the “precise questions” raised in the individual case).

prises so likely to exacerbate red tape and to delay and clog the federal courts as to engage the courts in supervision of the "plain English" of public notices. It would be highly undesirable to constitutionalize, and thus to rigidify, questions of administrative detail of this sort.

The notice at issue is quoted at pages 9-10, *supra*. The first thing to note is that its *accuracy* has not been questioned in this litigation, but only its format and diction. As to that, we concede the notice is not a model of English prose. But there is also no room for doubt that it is "of such nature as reasonably to convey the required information." *Mullane*, 339 U.S. at 314.

To be sure, the lines are long and the type size small. This was in order to fit the notice onto a card for convenient mailing and reference. Perhaps a letter format would have been better. In addition, the use of fewer capital letters might have enhanced readability. We do not think, however, that the *Constitution* is implicated by these typographic decisions.

Reading experts testified that under the most widely used test for measuring reading difficulty, the Massachusetts notice would be understood by persons of between a ninth and a twelfth grade education (Pet. App. A57-A60).³⁵ This might be thought to be too difficult for the target audience. (On the other hand, since 54.2% of the heads of Massachusetts food stamp households with earned income have completed high school (Pet. App. A62), it might be thought that a notice written at the ninth to twelfth grade level is about right.) But the *Constitution*, as interpreted by this Court, does not require that notices be the product of expert linguistic analysis. Cf. *Rhodes v. Chapman*, 452 U.S. 337, 348-349 n.13 (1981) ("opinions of experts" do not establish constitutional minima). The test is whether the notices reasonably convey the intended information.

³⁵ Other tests yielded somewhat higher measures of difficulty (Pet. App. A60-A61).

We are skeptical of using these expert analyses as the basis for a constitutional standard, particularly since they seem to disregard the specialized character of the vocabulary of welfare—a vocabulary that is very likely to be more familiar to those who see it or use it on a regular basis than it is to the population as a whole.³⁶ Indeed, the district court found that "food stamp recipients are generally familiar with the terms used in the notice" (Pet. App. A96), and that many of the same terms in the notice that caused concern to the reading experts are used in the initial food stamp application form, periodic recertification forms, and reapplication forms as well (*id.* at A65-A66).

We therefore doubt that words such as "within," "division," "recent," "federal," "benefit," "benefits," "eligibility," "eligible," "appeal," "reduced," "reduction," "deduction," "request," "action," "local," "welfare," "percent," "disagree" and the like (Pet. App. A60) will sow great confusion among the food stamp recipients to whom the notice is directed. And we lack the district court's confidence (Pet. App. A76) that a notice of *recent federal* statutory *reductions* in food stamp *benefits*, with information on how *eligible* recipients who *disagree* with the *action* can *request* an *appeal*, could be written without using many of these problematic terms. Moreover, the notice will presumably become even more complicated for the unsophisticated reader if, as the district court would require, additional information of a numerical nature is included—along with additional legal citations, to add to the confusion.

³⁶ The vocabulary component of the most widely used reading test, the Dale-Chall test, is based on the familiarity of words to children attending fourth grade in 1948, long before the federal welfare system had become a common feature of American life (Pet. App. A58). To base any conclusions regarding this target audience's ability to understand welfare terminology on the comprehension of children in 1948 is obviously absurd.

Even if much of the notice is difficult to understand, the notice unmistakably begins "IMPORTANT NOTICE—READ CAREFULLY" and explains that the household has a "RIGHT TO A FAIR HEARING." These simple concepts are the heart of the notice; they suffice to put any reasonably diligent person on notice that important information is conveyed and that he has a right to be heard. See *Memphis Light*, 436 U.S. at 13-19. Each of the named plaintiffs, who are assumed to be typical of the class (Fed. R. Civ. P. 23(a)), understood the notice well enough to seek further information and file an appeal (Pet. App. A50-A56). Cf. *Memphis Light*, 436 U.S. at 14 (party's inability to obtain hearing despite repeated good faith efforts "makes clear" that notice inadequately informed her of appeal procedures).

In any event, details of diction and typesetting are the stuff of program administration, not constitutional law. See *Memphis Light*, 436 U.S. at 27 (Stevens, J., dissenting). The level of prescriptive detail in the decision here far exceeds that in *Memphis Light*. There, the Court required only that the customers of the utility "be informed clearly of the availability of an opportunity to present their complaint" (436 U.S. at 14-15 n.15). Every detail of the district court's order here is in excess of that in *Memphis Light*.

Respondents have available a far more suitable means for improving the quality of notices used in the Food Stamp program: they can petition for rulemaking on print size and vocabulary. 5 U.S.C. 553(e); 7 C.F.R. 271.6. This approach would permit participation by affected persons—states as well as recipients—in formulation of sensible standards, and would leave the decision in the hands of the officials entrusted by Congress with administration of the program, subject, of course, to judicial review.³⁷

³⁷ In this connection, we observe that the Department has published a notice of proposed rulemaking which, if adopted, would require notices of mass changes to include several examples of how

Ultimately, the great vice of the decision below is that its hypersensitivity to relatively insignificant risks of inadvertent error may have a tendency to overshadow the far more important principle that Congress has the sole authority to control the terms and levels of noncontractual public benefits. As a result of this litigation, plaintiff-respondents may receive improved notice (the value of which, in cases involving across-the-board statutory changes, is minimal); but the Commonwealth is prevented from complying with a law duly enacted by Congress. Due process standards should, we submit, be formulated with due attention to the legitimate prerogatives of Congress, the legislatures, and the agencies. Process must not be allowed to overwhelm democratic decisionmaking.

III. THE MASSACHUSETTS NOTICE WAS ADEQUATE UNDER THE FOOD STAMP ACT AND IMPLEMENTING REGULATIONS

The court of appeals also concluded that the Food Stamp Act, 7 U.S.C. 2020(e)(10), and the Department of Agriculture regulations implementing that Act, 7 C.F.R. 273.12(e)(2)(ii), were violated by the Massachusetts notice. This ruling rested entirely on the court's prior conclusion that the notices were constitutionally insufficient (Pet. App. A31-A32); no independent basis exists to sustain it. Nothing in the language of the Act or the regulation cited by the court of appeals contains any *advance* notice requirement with reference to mass changes. The Massachusetts notice would appear to satisfy the regulatory requirement that beneficiaries be notified of the change in benefits. The statute does not contain any additional requirements. Accordingly, if this

the mass change would affect several differently-situated households. 47 Fed. Reg. 55725 (Dec. 28, 1982). Although this additional requirement would fall far short of what was ordered by the courts below, about half of the states submitting rulemaking comments opposed the proposal on the ground that it would be excessively burdensome.

Court agrees that the Massachusetts notice satisfied constitutional requirements, it should reverse the court of appeals' judgment on statutory and regulatory grounds as well.³⁸

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1984

³⁸ If plaintiff-respondents have any argument, independent of the constitutional argument, that the Massachusetts notice was in violation of the Food Stamp Act or the "mass change" regulations, they should be free to raise it on remand, assuming that a justiciable controversy still exists.

APPENDIX

1. The Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, § 106, 95 Stat. 360, provides:

Section 5(e) of the Food Stamp Act of 1977 is amended by striking out "20 per centum" in the third sentence and inserting in lieu thereof "18 per centum".

2. 7 U.S.C. 2014(e) provides in relevant part:

In computing household income for purposes of determining eligibility and benefit levels for households containing an elderly or disabled member and determining benefit levels only for all other households, the Secretary shall allow a standard deduction of \$85 a month for each household [in the continental United States]. * * * All households with earned income shall be allowed an additional deduction of 18 per centum of all earned income (other than that excluded by subsection (d) of this section), to compensate for taxes, other mandatory deductions from salary, and work expenses. * * *

7 U.S.C. 2020(e) provides in relevant part:

The State plan of operation required under subsection (d) of this section shall provide, among such other provisions as may be required by regulation—

* * * * *

(10) for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program or by a claim against the household for an overissuance: *Provided*, That any household which timely requests such

a fair hearing after receiving individual notice of agency action reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits on the basis authorized immediately prior to the notice of adverse action until such time as the fair hearing is completed and an adverse decision rendered or until such time as the household's certification period terminates, whichever occurs earlier, except that in any case in which the State agency receives from the household a written statement containing information that clearly requires a reduction or termination of the household's benefits, the State agency may act immediately to reduce or terminate the household's benefits and may provide notice of its action to the household as late as the date on which the action becomes effective;

* * * *

3. 7 C.F.R. 273.12(e) provides in relevant part:

Mass changes. Certain changes are initiated by the State or Federal government which may affect the entire caseload or significant portions of the caseload. These changes include adjustments to the income eligibility standards, the shelter and dependent care deductions, the Thrifty Food Plan, and the standard deduction; annual and seasonal adjustments to Social Security, SSI, and other Federal benefits, periodic adjustments to AFDC or GA payments; and other changes in the eligibility criteria based on legislative or regulatory actions.

* * * *

(ii) A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies

shall send individual notices to households to inform them of the change. If a household requests a fair hearing, benefits shall be continued at the former level only if the issue being appealed is that food stamp eligibility or benefits were improperly computed.

7 C.F.R. 273.13 (1983) provides in relevant part:

Notice of adverse action.

(a) *Use of notice.* Prior to any action to reduce or terminate a household's benefits within the certification period, the State agency shall, except as provided in paragraph (b) of this section, provide the household timely and adequate advance notice before the adverse action is taken.

(1) The notice of adverse action shall be considered timely if the advance notice period conforms to that period of time defined by the State agency as an adequate notice period for its public assistance caseload, provided that the period includes at least 10 days from the date the notice is mailed to the date upon which the action becomes effective. Also, if the adverse notice period ends on a weekend or holiday, and a request for a fair hearing and continuation of benefits is received the day after the weekend or holiday, the State agency shall consider the request timely received.

(2) * * * The notice of adverse action shall be considered adequate if it explains in easily understandable language: The proposed action; the reason for the proposed action; the household's right to request a fair hearing; the telephone number and, if possible, the name of the person to contact for additional information; the availability of continued benefits; and the liability of the household for any overissuances received while awaiting a fair hearing if the hearing official's decision is adverse to the

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household. If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service.

* * * * *

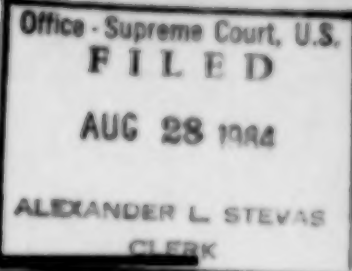
(b) *Exemptions from notice.* Individual notices of adverse action are not required when:

(1) The State initiates a mass change as described in § 273.12(e).

* * * * *

RESPONDENT'S BRIEF

(6) (6)
Nos. 83-6381 and 83-1660



IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

—
GILL PARKER, *et al.*, *Petitioners*,

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, *et al.*

—
CHARLES M. ATKINS, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
Petitioner,

v.

GILL PARKER, *et al.*

—
On Writs Of Certiorari To The United States
Court Of Appeals For The First Circuit

—
BRIEF FOR PARKER, ET AL.

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QUESTIONS PRESENTED*

1. Did the district court abuse its equitable discretion by requiring that future food stamp notices of the Massachusetts Department of Public Welfare comport with the minimum requirements of the Food Stamp Act?
2. Did the court of appeals violate the command of the Food Stamp Act by refusing to permit the restoration of benefits withheld without the prior, adequate notice required by the Act?
3. Whether the Commonwealth's Cross-Petition in No. 83-1660 should be dismissed as improvidently granted due to its failure to challenge the independent statutory basis for the decisions below.
4. Whether a notice of reduction or termination of need-based benefits which wholly failed to provide its recipients with any of the information needed to determine if an error had likely been made violated the Due Process Clause.
5. Whether Rule 52(a) contains an exception for factual determinations made in the context of constitutional adjudication.

*Questions 1 and 2 address the issues presented in the petition of Parker, *et al.*, No. 83-6381, while questions 3-5 respond to the contentions of cross petitioner Atkins in No. 83-1660.

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BRIEF FOR PARKER, ET.AL.

OPINIONS BELOW

The opinion of the court of appeals [PA 1-38]¹ is reported at 722 F.2d 933. The opinion of the district court [PA 42-98] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1983. The petition in No. 83-6381 was filed on March 6, 1984. The conditional cross-petition, No. 83-1660, was filed on April 9, 1984. The petition and the cross-petition were granted on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, and its implementing regulations, 7 C.F.R. Pt. 272, are set forth in Appendix A to this brief.

STATEMENT

Before this Court is the unappealed finding that the Massachusetts Department of Public Welfare (the Department) violated both the Food Stamp Act, 7 U.S.C. § 2020(e)(10), and one of its implementing regulations, 7 C.F.R. § 273.12(e)(2)(ii), by sending inadequate notice of a benefit reduction or termination to the plaintiff class. The issue presented by the plaintiffs is whether the First Circuit Court of Appeals erred in reversing the district court's exercise of its broad remedial discretion in fashioning relief for those violations. The trial court enjoined the Department from reducing a program participant's food stamp benefits in the future without first providing adequate advance warning, and ordered the restoration of the benefits that were found to have been with-

¹ "PA" denotes the appendix to the petition in No. 83-1660. The Joint Appendix will be referred to as "JA."

held pursuant to the statutorily insufficient notice. In addition, the Department was instructed to develop regulatory standards to insure the comprehensibility and legibility of its future food stamp notices of reduction or termination, and to submit those proposed standards to the court for its inspection and approval.

It is not the plaintiffs' contention that the district court was required to afford them all of the relief it chose to grant. Rather, it is their position that it was well within the appropriate discretion of the court to do so, and that it was therefore impermissible for the appeals court to substitute its remedial preferences for the options chosen by the trier of fact. In order to evaluate the propriety of the remedy afforded, it is necessary to examine the context and purpose of the statutory provision that has been violated. Consequently, before reviewing the proceedings and results in the courts below, plaintiffs will set forth the basic contours and premises of the Food Stamp Program itself.

A. Statutory And Regulatory Framework

The Food Stamp Program is a need-based subsistence program created by Congress to alleviate hunger and malnutrition among this nation's low-income households. 7 U.S.C. § 2011; 7 C.F.R. § 271.1(a). Initially, it was designed with the goal of allowing such households to purchase sufficient stamps to provide each with a "nutritionally adequate diet." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 529 (1973). Since the Court's review in 1973, however, Congress has acknowledged that "the best the food stamp program can do is to permit low income households 'to obtain a more nutritious diet' rather than permitting them to purchase a nutritionally adequate diet." H.R. Rep. 95-464, 95th Cong., 1st Sess. 423 (1977).²

² The federal defendant suggests that the Thrifty Food Plan, upon which food stamp coupon allotments are based, is purposely inflated to provide for error tolerances. Federal Brief at 3 n.3. This is inaccurate. The Thrifty Food Plan is the least costly of four plans considered by U.S.D.A. and was

Although food stamp benefits are paid entirely from the United States Treasury, their actual distribution is administered by the individual states, pursuant to plans that must comply with the provisions of the Act and the implementing Department of Agriculture regulations. 7 U.S.C. §§ 2013(a), 2014(b) and 2020(d). In Massachusetts, the responsible agency is the Department of Public Welfare. It determines eligibility for benefits on a household basis, which focuses on individuals or groups who customarily purchase and prepare meals together. 7 U.S.C. § 2012(i). Households found to be eligible participate for a distinct certification period, which may vary in length from one to twelve months, depending on the predicted stability of household eligibility factors. 7 U.S.C. § 2012(c) and 7 C.F.R. § 273.10(f).

In order to ascertain whether a household is eligible for a monthly allotment of stamps, the Department must acquire, *inter alia*, information about the household's income, resources, family size, immigration status and living expenses. 7 U.S.C. § 2014(c), (d), (e) and (i). It must also determine that the household continues to remain eligible throughout its certification period and that it has neither been overpaid nor underpaid during that time. 7 U.S.C. § 2020(e)(4) and 7 C.F.R. § 273.12(c). Obviously, if each state agency had to independently acquire and update so much information for each potentially eligible participant, it would represent a staggering, if not impossible, task. Congress responded to this potential problem by creating a system in which the household itself has been made the primary source of both information about and verification of its individual circumstances. 7 U.S.C. § 2015(c), 7 C.F.R. § 273.2(f)(5), and 106 Code of Massachusetts Regulations (CMR) §§ 361.050 and 366.110. In fact, cooperation in the provision of information sufficient to allow the state agency to determine eligibility for and the amount of benefits is a program requirement. 7 U.S.C. § 2015(c)(1). If a

designed to provide only 100% of the minimum Recommended Dietary Allowance for food nutrients. H.R. Rep. 95-464, *supra* at 186-187, 194 procedure 7, 197, 199 assumptions 9, 15 and 16.

household refuses to cooperate in making such information available, it is simply rendered ineligible to participate. 7 U.S.C. § 2015(c).

In addition to providing data necessary to a determination of their initial eligibility, households must also keep the agency abreast of any changes that might affect their ongoing participation. They are required to report, within ten days of their occurrence, such things as changes in income, resources, household composition, residence, shelter costs, medical expenses; even the acquisition of a licensed vehicle. 7 C.F.R. § 273.12(a). Again, Congress and the Secretary of the Department of Agriculture have chosen to make the participants the primary source of this data. This is understandable, for the nature of the information involved is highly individual and personal. Self-declaration, followed by verification only when deemed necessary, is probably the only system that could prove both reasonably accurate and administratively feasible. See 7 C.F.R. § 273.2(f)(2).

Given the vast amount of information and the degree of individual detail necessary to administer the Food Stamp Program, errors are of course inevitable. The sources of such errors are as varied as the list of human frailties. Participant error may be caused by an intentional misrepresentation, an unintentional provision of misinformation, or an inadvertent failure to report something that is germane to the calculation of benefits. Agency error may result from a failure to inform households of their responsibilities or a failure to act on information that has been provided. It may take the form of an incorrect numerical calculation or a misapplication of some rule to a given participant's situation. Errors may occur when an agency recalculates an individual's benefits because of a change specific to that person, or when the agency recalculates the benefits of large numbers of participants in response to a statutory or regulatory revision which changes the way in which the agency is accustomed to proceeding.³

³ Widespread changes in the Food Stamp Program triggered by legislative amendments to the Act have repeatedly been identified as a major source of

Congress has not chosen to ignore the fact that the program is prone to errors. It has, for example, enacted provisions that offer state agencies incentives to reduce mistakes by increasing the percentage of administrative costs that will be paid by the federal government if error rates are brought below designated levels. 7 U.S.C. § 2025(c). It has also provided that any errors that do nonetheless occur should be subject to challenge and redress. 7 U.S.C. §§ 2020(e)(10), (e)(11) and 2023(b).

The system created by Congress to redress agency errors is premised upon the availability of a fair hearing to challenge a proposed agency action. It would undoubtedly be administratively crippling if the Act required state agencies to conduct a hearing every time a program participant suffered a benefit reduction. The administrative resources necessary for such an undertaking would surely exceed those that are available. Congress, however, has not required as much. Rather, it has devised a system that balances the program's potentially conflicting needs for efficient administration and individual household protection. Again, as with the information necessary to determine eligibility and benefit levels, Congress has made the

agency error. Representative Foley, then Chairman of the House Agriculture Committee, while addressing the House with regard to one of the proposed 1980 amendments to the Act, Pub. L. 96-249, stated:

Let me tell my colleagues on the committee they should talk to their State agencies about what is causing errors. . . . They will tell you that Congress is constantly changing the provisions of the Act, which . . . is making it impossible for States trying to eliminate errors to be able to do so. 126 Cong. Rec. H3436 (daily ed. May 8, 1980).

And Senator Dole, long a major proponent of the Food Stamp Program, in discussing the impact that various proposed provisions of the Omnibus Budget Reconciliation Act of 1982, Pub. L. 97-253, would have on the program, noted that:

Mr. President, there is little question in my mind that high error rates in the food stamp program are caused, at least in part, by the constant policy changes in the program. 128 Cong. Rec. S9915 (daily ed. August 5, 1982).

Senator Dole then quoted at length from two state agency administrators who had testified before the Senate Agriculture Committee that such program changes confused both workers and recipients and thereby increased error rates. 128 Cong. Rec. S9916.

participating household the primary resource for detecting and correcting potential errors, based on the premise that each household best knows the facts of its particular case. Only those households that feel they have been aggrieved by agency action and request a hearing are entitled to receive one. 7 U.S.C. § 2020(e)(10). If no hearing is requested, the proposed action takes effect, whether or not it is in fact correct. In this way, the vast majority of administrative actions go unchallenged, thereby leaving the state agencies with sufficient resources to conduct the program. In order for the system to function, the Act and regulations contemplate that a household will receive an informative notice of any adverse action that the agency plans to take with regard to its grant, thus enabling it to decide whether or not to trigger the administrative review process by requesting a fair hearing. To complete these protections against potentially erroneous reductions of a participant's benefits, Congress has provided that if a household does timely request a hearing, its allotment may not be reduced until the hearing has been held and an adverse decision rendered. 7 U.S.C. § 2020(e)(10).

B. Background Facts

In August of 1981, Congress passed the Omnibus Budget Reconciliation Act (OBRA), one section of which changed the amount of the earned income disregard available to Food Stamp households from 20 percent to 18 percent. (Pub. L. 97-35, § 106; 95 Stat. 360). On September 4, 1981 the federal defendant promulgated regulations which required state agencies to implement this change no later than 90 days from October 1, 1981. 7 C.F.R. § 272.1(g)(35)(ii) [PA 44, Finding 2].

Massachusetts chose to implement the change in late November 1981, one month earlier than required [PA 93-94, Conclusion 15]. It therefore issued a notice to 19,654 food stamp households announcing the proposed change [PA 44, Finding 3]. In early December, plaintiffs commenced this action contending, *inter alia*, that the November notice failed to adequately inform the plaintiff class of the action being taken against them. On December 17, 1981, the district court issued a

temporary restraining order enjoining any reductions or terminations based on the November notice and ordering the reinstatement of any benefits already withheld. The court also certified the case as a class action.

On or about December 24, 1981, the Department issued a new notice dated December 26, 1981, again attempting to implement the change in the earned income disregard. This notice was reproduced in 5.75 to 6 point print on two standard size computer stock cards [PA 67-68, Findings 61-63]. The notice did not even tell affected participants whether their benefits were to be terminated or reduced, much less the amount of any reduction [PA 70-71, Findings 69-71, 73]. Moreover, the composition of the notice (*i.e.*, the language, line length, syntax and organization) made it very difficult to understand [PA 96, Conclusion 20]. It was impossible for a recipient to determine from the notice what action the Department intended to take or whether an error had been made [PA 70-71, Findings 69-73; 94-95, Conclusion 16].

Plaintiffs immediately filed a supplemental complaint attacking the adequacy of this notice and sought a second temporary restraining order. On December 31, 1981, the court denied plaintiffs' motion for temporary relief.

C. The District Court Trial

The district court consolidated plaintiffs' subsequent motion for a preliminary injunction with the trial on the merits and in October 1982 held a two day bench trial.

Plaintiffs introduced evidence from four program participants; Gill Parker, Cecelia Johnson, Stephanie Zades and Madeline Jones. All four were unable to understand the December notice primarily because of its poor organization and syntax [PA 52-54, 56, Findings 21, 22, 24 and 27]. They were unable to determine what action (a reduction or termination of benefits) the Department intended to take with regard to them or the dollar amount of any reduction in their benefits [PA 51-52, 54, Findings 21, and 24; 70-71, Findings 69-73]. They also had physical difficulty reading the December notice. Gill

Parker and Madeline Jones had to use a magnifying glass, while Stephanie Zades was not able to finish reading the notice due to eye strain [PA 53, 54, Findings 22 and 24].

Ms. Johnson, Mr. Parker and Ms. Zades all called their food stamp caseworkers in an effort to find out what was going to happen to their food stamps. In each case, the food stamp caseworkers were unable to provide any information at all [PA 51, 54, Findings 21 and 24; JA 139]. Ms. Jones also tried to reach her caseworker, but was informed he was not available [Court of Appeals App., Vol. III, 128 ¶ 8].⁴

Because they were unable to determine what was about to happen to their food stamp benefits, all four recipients appealed. Gill Parker's appeal became moot because he was recertified in December [PA 53, Finding 23; JA 140-141]. Stephanie Zades and Cecelia Johnson won their hearings because even at that time the Department files did not contain enough information to explain the basis for the proposed reductions [JA 132, 150]. Madeline Jones lost her appeal [PA 56, Finding 27].

The evidence demonstrated that there was a substantial risk of error with respect to the Department's efforts to implement the change in the earned income disregard [PA 88-91, Conclusions 8-11]. During October, November and December 1981, there was a massive data entry backlog in the Monthly Income Reporting System (MIRS) [PA 78-79, Findings, 93-94]. Of the approximately 16,000 food stamp households receiving the December notice, 9,191 of them participated in MIRS [PA 78, Finding 91]. If any of those households reported any change in their circumstances, including a change in income, in October or November 1981, it was more likely than not that the updated information was not utilized in implementing the change in the earned income disregard [PA 79, Finding 95]. Without the correct earned income figure in the computer, the amount of any reduction due to the change in the earned income disregard would be incorrect [PA 77-78,

⁴ Hereinafter referred to as, *e.g.*, III CAA 128.

Finding 90]. Because of this data entry backlog, the likelihood of error with respect to any MIRS household affected by the change (57.4% of the class) was increased [PA 80, Finding 97; 89, Conclusion 9].

The computer which the Department utilized to implement the change in the earned income disregard generated a report (the 902C Report) which listed each affected household. Included in this report was each household's old benefit amount, new benefit amount and earned income, as well as other household-specific data utilized to compute each household's food stamp benefits [PA 80, Finding 99; JA 43-44]. A random sampling of 5,013 of the approximately 16,000 cases listed on the 902C report showed 585 cases with no earned income which were erroneously sent the December notice [PA 81-83, Findings 101, 107]. Of these, 211 had their benefits erroneously changed [PA 81, Finding 102]. The random sampling done by the plaintiffs was only designed to uncover one of the most obvious computer programming mistakes (*i.e.*, reductions or terminations of households with no earned income). It could not uncover any errors made because of the use of the stale MIRS data, or those based upon other data or computational flaws [PA 82, Finding 105; II CAA 76, L16-19]. The sample page of the 902C Report in evidence shows two households with no earned income; one of which suffered a termination of its benefits, the other a reduction [JA 44].

The evidence also indicated, and the district court found, that both the Department and its computer programming counterpart, the Bureau of Systems Operations (BSO), were in a state of chaos in late 1981 due to the massive changes in the Food Stamp and AFDC Programs required by OBRA [PA 72, 73, Findings 76, 81; 89, Conclusion 9]. The district court concluded that the above factors, exacerbated by the wholly uninformative and incomprehensible nature of the notice, established a substantial risk of erroneous deprivation [PA 88-91, Conclusions 8-11; 95, Conclusion 17].

Evidence was also introduced with regard to the comprehensibility and legibility of the notice. The plaintiffs and the de-

fendants each introduced expert testimony concerning the reading difficulty of the notice. Both reading experts agreed that readability analysis involves both a quantitative statistical component (evaluation of word and sentence length and, in some tests, the difficulty of the vocabulary) and a qualitative analysis (evaluation of organization, syntax, and vocabulary) [PA 56, Finding 28]. The court specifically accepted the testimony of the plaintiffs' expert and found that using the Dale-Chall test, page one of the December notice tested objectively at a reading grade level of 9-10 and page two at a reading grade level of 11-12 [PA 57-58, Finding 31].⁵ The results were even higher using the Fry Graph Test or the Fogg Formula [PA 60-61, Findings 39 and 41]. Utilizing the Flesh formula, page one tested objectively as fairly difficult (like a quality magazine), while page two tested objectively as difficult (like an academic journal) [PA 61, Finding 40]. The defendants' expert, although testifying that subjective analysis is vital to any text evaluation, did not proffer an opinion on the subjective difficulty of the December notice [JA 235]. Plaintiffs' expert, Dr. Conard, of the Harvard Graduate School of Education, stated that the organization of the December notice was poor [JA 27-28, 194]; that the extensive use of conditional sentences made it more difficult to understand [JA 28, 195]; that the inclusion of conflicting and confusing information made it misleading [JA 28, 195]; and that the use of small print further increased the reading difficulty of the notice [JA 196-197]. Dr. Conard concluded that *the December notice could not be understood by high school graduates* [JA 201].

Plaintiffs also introduced evidence showing that 45.8 percent of the heads of food stamp households with earned income in Massachusetts have not completed high school and that 82.2 percent of them have a twelfth grade education or less [PA 62, Findings 43 and 44]. By applying this data to her readability analysis of the December notice, Dr. Conard concluded that

⁵ Both defendants dismiss the importance of the first page of the notice in this case. But, because it was the first page, and was so poorly presented and so confusing, many recipients were unlikely even to reach the second page [JA 137, 150, 194-195].

about 80% of the food stamp recipients who received the notice could not be expected to understand it [JA 202]. The district court, relying upon this unrefuted evidence, as well as that establishing that the print size, line lengths, line and word spacing, typeface, use of upper case letters and poor production quality⁶ all combined to make the December notice more difficult to read and understand [PA 68-69, Findings 64-68], concluded that:

[T]he nature of the language and the format of the notice was (sic) not reasonably designed to convey the information contained. Although food stamp recipients are generally familiar with the terms used in the notice, the composition of the notice made it very difficult to understand especially considering the education level of most recipients [PA 96, Conclusion 20].

The court further found that the provision of an informative and comprehensible notice in this case was not only administratively feasible for the Department, but that it would have been administratively beneficial [PA 75-77, Findings 84-86; 94-95, Conclusion 16]. Relying upon the unrefuted testimony of Dr. Mark Bendick, an expert in the administration of public welfare programs, the district court found that an informative notice would benefit the Department by reducing the number of client visits and phone calls seeking only clarification, thereby freeing up the time of caseworkers for other tasks [PA 76-77, Finding 86; 94-95, Conclusion 16; JA 94-95, 99-100]. Further, based on the testimony of Harry Kreide, Deputy Director of B.S.O., the court also concluded that if the Department had asked B.S.O. to program the computer to include the relevant information in the December notice, it is likely that B.S.O. would have been able to do so without any difficulty or delay in the issuance of the notice [PA 75-76, Finding 84].

⁶ The December notice is reproduced at JA 4-5. This reproduction indicates the size and format of the original notice. It does not however accurately reflect the poor production quality of the original [PA 69, Finding 67]. Further, the print contrast in the reproduction is greater because it appears on a white background, not the orange and gold actually utilized. Plaintiffs respectfully refer the Court to an original notice which is included in the original papers from the district court as Plaintiffs' Exhibit 2.

Indeed, Mr. Kreide repeatedly emphasized that programming the computer to provide a notice containing such information was simple [JA 221, 224-227].

Finally, relying upon the testimony of Dr. Bendick and the experience of the Social Security Administration in rewriting its Supplemental Security Income notices at a sixth grade reading level, the court determined that it is administratively feasible for the Department to draft food stamp notices of reduction or termination at the fifth-sixth grade reading level without sacrificing the need for clarity or precision [PA 76, Finding 85; JA 105, 106, 113-114].

On March 24, 1983, the district court entered a carefully tailored Order granting declaratory and injunctive relief to the plaintiff class [PA 99-106]. Based upon its conclusion that the December notice violated both the Food Stamp Act and the Due Process Clause of the Fourteenth Amendment [PA 96-98, Conclusion 20-23], the court ordered that all future food stamp reduction or termination notices be mailed at least ten days prior to the proposed action and contain an explanation of the action, the benefit amount before and after the change and sufficient information to allow the recipient to determine whether an error has been made [PA 103-104, ¶ 5]. In addition, the Department was directed to draft regulations containing specific standards to ensure that future food stamp notices are legible and comprehensible [PA 102, ¶ 3]. Finally, the court ordered the defendants to return to each household in the plaintiff class all food stamp benefits lost as a result of the action taken pursuant to the December notice, but only until the earlier of the following: 1) the month following the date the household was next recertified for participation in the food stamp program; 2) the date the household was terminated or withdrew from participation in the food stamp program for reasons not related to the change in the earned income disregard; or 3) the date the household received a legally sufficient notice of the change [PA 101, ¶ 2].⁷

⁷ Other aspects of the court's order regarding the provision of multi-lingual notices were not challenged by the defendants in the court of appeals, nor are they at issue here.

The provisions of the district court's March 24, 1983 Order were incorporated into its judgment entered on March 25, 1983. Both the state and federal defendants appealed from this judgment and obtained a stay during the pendency of the proceedings before the Court of Appeals for the First Circuit.

D. The Decision Of The Court Of Appeals

On December 7, 1983, the court of appeals entered its decision and judgment affirming the district court's disposition on the merits of plaintiffs' claims, but reversing both the prospective injunctive relief and the restitution of the wrongfully withheld benefits. The First Circuit found that the "record reveals ample support for the court's conclusion that the December notice was difficult to read, relatively difficult to comprehend, ambiguous . . . , and that it lacked the specific information necessary to allow recipients to determine if a calculation (sic) [error] had been made" [PA 21]. Due to these deficiencies, compounded by the significant risk of error, the appellate court concluded that the December notice violated the Due Process Clause of the Fourteenth Amendment [PA 24-25]. Alternately, after parsing the language of 7 U.S.C. § 2020(e)(10), the court determined that the December notice had to comport with its requirements [PA 29], but had not because it was neither timely nor informative [PA 29-32].

The First Circuit next addressed the appropriateness of the district court's equitable decree. It reversed that portion of the order restoring the wrongfully withheld benefits to the class because it felt that such relief would result in some recipients receiving benefits in excess of the substantive levels established by Congress [PA 33]. In lieu of the restitution remedy fashioned by the district court, the court of appeals directed the Department to engage in a file review to attempt to uncover and reimburse any households which suffered substantively erroneous reductions or terminations [PA 35-37].

Finally, the appeals court also reversed the district court's award of prospective injunctive relief regarding the form and content of future food stamp notices. It based this action upon its observation that the Department had not acted in bad faith,

and its unsubstantiated belief that it would strive to do better in the future [PA 37-38].⁸

SUMMARY OF ARGUMENT

Congress has developed what can only be described as an ingenious system to accomodate the numerous and at times conflicting needs of administrators and participants in the Food Stamp Program. Households are utilized as the primary source of the vast amount of personal data required to make accurate eligibility and allotment decisions, and are entrusted with the primary responsibility for detecting and bringing to the agency's attention any errors in the computation of their benefits. To help participants accomplish the latter task, Congress has provided a delicately balanced notice and hearing system that requires informative notices of reductions or terminations in food stamp allotments so that the hopefully small number of families who are being wrongfully treated will be able to discover impending errors and freeze their current

⁸ Regrettably, this surmise has proved unwarranted. Since the First Circuit decision, the Department has implemented another so-called mass change due to the January 1984 cost of living adjustments in Social Security benefits. A copy of the relevant portions of the Department's instructions to the field regarding implementation of this change is annexed hereto as Appendix B. Although the mass change notice this time provided the old and new food stamp benefit amounts, it again did not provide a sufficient factual basis for the proposed action to allow its recipient to make an informed determination of whether an error had likely been made. The Department also did not require the provision of advance notice despite the First Circuit's explicit holding that such notice is required. (Appendix B at 4a, 7a).

Further, despite the purported mechanical nature of the change, errors were clearly made. A copy of a notice sent to one client informing her of a \$48.00 reduction in her food stamp benefits due to these changes is annexed hereto as Appendix C (with identifying data deleted for confidentiality purposes). There is nothing contained in the notice which would cause the average person to realize that an error had been made. Yet, for the amount of the reduction to be correct based on the reason given, the client would have to be receiving \$4,571.43 per month in Social Security benefits. Since no one can receive that amount, perhaps it would have helped the Department as well as the household to have provided the factual basis for its proposed action.

level of participation by requesting a hearing. 7 U.S.C. § 2020(e)(10).

Both lower courts determined that the Department could not legally, but did, dispense with the adequate advance notice required by the Act. They found such an omission especially egregious in light of the errors likely to have been generated by reducing or terminating the benefits of thousands of food stamp households, based on the earned income of each, by means of a major alteration to the Department's complex computer master file at a time of severe programmer shortages and data entry backlogs.⁹ Neither defendant has appealed that part of the judgment of the court of appeals which determined that the Department had violated § 2020(e)(10) of the Act. That finding is therefore not before the Court. Because it provides an independent basis for the decision below, it renders unnecessary and therefore inappropriate consideration of the constitutional issues raised in the Department's cross-petition, No. 83-1660. Consequently, the cross-petition should be dismissed as improvidently granted.

Despite knowing that its systems were under stress and subject to error, the Department chose to implement the change in the earned income disregard a month early and to use an uninformative notice to do so. Even after that initial notice was successfully challenged in court by means of a T.R.O., the Department did not bother to inquire whether its programmers could provide the information desired by the program's participants. Had it done so, it would have found that the task was simple to accomplish. Certainly, in such circumstances, it

⁹ The chaotic state of affairs at B.S.O. and the magnitude of the task involved in reprogramming the master file to accomplish what the defendants have characterized as a minor computational change were described in detail by Harry Kreide, Deputy Director of the B.S.O. [JA 221-223]. As to the latter subject, he stated:

This particular change was not what I would call a small change, not because of the notification that was sent to Food Stamp recipients or the information on that card, but because of the change to the programs that maintain the master file. That is where the significant change occurred [JA 221].

was well within the discretion of the district court to enter a prospective injunction requiring the Department to issue comprehensible notices that would comply with the provisions of § 2020(e)(10). Such relief is designed to act as a deterrent to future violations, not as punishment for past misconduct. Indeed, the Department's recent issuance of another "mass change" notice¹⁰ that did not comply with the requirements set forth in the clear declaration of the First Circuit indicates that the injunction issued by the district court was not only appropriate, but apparently necessary to protect households from the Departments' ongoing lack of concern for the requirements of § 2020(e)(10). Future events have therefore demonstrated in this case exactly why it was impermissible for the court of appeals to substitute its remedial preferences for those of the district court, based upon an unsubstantiated surmise as to the likely future conduct of the Department.

The district court was also correct in ordering the restoration of the benefits that the Department withheld in violation of § 2020(e)(10). This is because Congress has provided that any benefits "wrongfully withheld shall be restored" to any household that challenges the illegal agency action, whether administratively or in court. 7 U.S.C. § 2023(b). This statutory remedy is designed to accomplish two related program goals. First, it encourages participants to come forward with any complaints about agency procedures, and not to suffer silently whatever unauthorized action may befall them. Second, it vests in participating households the perception that they are not the only ones who are required to follow the dictates of the program, thus fostering the respect necessary to insure that the Act's reporting system, which is based primarily on the good faith of those households, will not totally break down. Thus, restoration of the benefits illegally withheld by the Department responds to the command of § 2023(b) in particular, and furthers the underlying objectives of the Food Stamp Act generally.

¹⁰ See Appendices B and C.

Because the Act specifically grants each household an entitlement to undiminished benefits during its certification period until it has been afforded a meaningful opportunity to challenge a proposed reduction, program participants possess a property interest in the receipt of those benefits that requires the provision of notice whenever a reduction or termination is contemplated by a state agency. This entitlement to meaningful notice is not negated or reduced because many households happen to be simultaneously suffering a reduction based on the individual facts of their specific cases. Indeed, where, as here, the attempt to reduce thousands of families at once caused errors to occur at a rate over two times that of the professed norm, due process would seem to require better, not worse, notice. This is especially true in light of the fact that the provision of adequate notice would have cost the agency nothing but the price of ink, which would have been more than recouped by the uncontested administrative savings that would have resulted [JA 224; PA 76-77, Finding 86]. In such circumstances, a notice that does not provide useful information, that is produced so poorly that it can hardly be deciphered, and that is so difficult to read that over eighty percent (80%) of its recipients cannot be expected to understand it does not constitute reasonable notice. Such a notice certainly does not meet either the rigorous demands of § 2020(e)(10) or the minimum requirements of the Due Process Clause.

In reaching the latter determination, it was entirely appropriate for the court of appeals to review the district court's findings under the standard of Rule 52(a) of the Federal Rules of Civil Procedure. The detailed and complex factual development undertaken in this case was surely best left to the trier of fact, whose first-hand observations and judgment are entitled to substantial deference. While the record in this case is replete with support for each conclusion reached after trial, the practice of limiting appellate review to a search for clearly erroneous findings remains a wise one grounded in the appropriate functions of the various courts. Certainly in the current case, where the standard of Rule 52(a) is reinforced by this Court's "two-court rule", an independent review of the facts would seem both unnecessary and ill-advised.

ARGUMENT

POINT I

THE JUDGMENT OF THE TWO LOWER COURTS THAT THE DECEMBER NOTICE VIOLATED THE FOOD STAMP ACT HAS NOT BEEN APPEALED AND SHOULD NOT BE DISTURBED.

A. The Department's Cross-Petition For Certiorari Did Not Challenge The Determination That The December Notice Violated The Food Stamp Act And Its Implementing Regulations

Both the district court and the First Circuit found that the notice at issue in this case did not comport with the mandate of 7 U.S.C. § 2020(e)(10) [PA 98, 29-30]. Each court further determined that the Department's efforts to notify program participants of the proposed reductions and terminations did not even satisfy the requirements of 7 C.F.R. § 273.12(e)(2)(ii) (the so-called "mass change" notice regulation) [PA 98, 30-31]. In his cross-petition for certiorari, the state Commissioner questioned only the standard of review employed by the court of appeals and its conclusion that the December notice violated the dictates of due process. The Secretary of Agriculture did not seek any review of the judgment below and in fact opposed both petitions that were filed. Consequently, pursuant to Supreme Court Rules 21.1(a) and 34.1(a), the determination that the challenged notice violated § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii) is not properly before this Court. *Local 1976, United Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93, 96 n.1 (1958) ("We therefore find it unnecessary to consider other contentions now made by petitioners on issues resolved against them by both the Board and the Court of Appeals . . .").

Nonetheless, the Secretary suggests that a challenge to the statutory basis for the First Circuit's decision is fairly subsumed in the state petitioner's challenge to the constitutional holdings because, in his view, the former was merely part and parcel of the latter. The opinion below, however, reveals that

the court of appeals specifically examined the statute and concluded, as an independent and alternate basis for its decision, that the December notice had not met its requirements.

The First Circuit's statutory analysis initially responds to an argument raised by the Secretary that § 2020(e)(10) only applies to those situations in which his regulations mandate a "notice of adverse action". See 7 C.F.R. § 273.13. Noting that Congress explicitly allowed an exception where reductions are based on a household's "written statement" requiring such action, the court concluded that § 2020(e)(10) was designed "to require the provision of advance notice in all other circumstances (fn. omitted)" [PA 30].

Having determined that the statute required advance notice in this case, the court of appeals proceeded to consider the nature of that notice. It is here that the state petitioner and the Secretary have misconstrued the import of the court's analysis. The First Circuit did not rule that the notice violated § 2020(e)(10) simply because it violated the Constitution. Rather, the decision clearly provides [PA 31]:

The district court found the December notice unconstitutional because the notice failed to convey meaningful information to affected recipients. We believe the notice failed to satisfy statutory requirements for the same reason—the notice in question failed to inform recipients.

The court found that the statute, by its language and structure, required advance notice that conveyed meaningful information to its recipients. The court's subsequent observation that "[w]e doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement" [PA 31], served as nothing more than a restatement of this Court's oft-noted assumption of "congressional solicitude for fair procedure, absent explicit statutory language to the contrary." *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). The First Circuit read the explicit statutory language to mandate a meaningful notice as part of this fair procedure, and, thus, concluded that the December notice did not comply with the statute's dictate.

It is therefore apparent that the court of appeals did in fact develop and decide the statutory issue as an independent, alternative ground for its decision. Because that aspect of its judgment has not been appealed, plaintiffs strongly urge the Court to leave it undisturbed and reject the Secretary's belated attempt to "smuggl[e] additional questions into a case after we granted certiorari." *Irvine v. People of the State of California*, 347 U.S. 128, 129 (1954).

The state petitioner, while noting the lower courts' "independent findings that the notice violated § 2020(e)(10) of the Food Stamp Act", nonetheless urges the Court to consider the due process questions it wishes to have heard. State Brief at 26 n.17. No authority is offered for this novel proposition that the Court should bypass an unappealed, independent statutory decisional ground in order to reach the fertile field of constitutional adjudication. This is almost certainly because the relevant case law indicates an opposite approach. Numerous cases decided as early as *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936), and as recently as last term repeat the "well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case". *Escambia County, Florida v. McMillan*, ___ U.S. ___, 104 S. Ct. 1577, 1579 (1984) (*per curiam*). In *Escambia*, the Court declined to consider the proffered constitutional challenge because it glimpsed a possible alternative statutory ground to support the judgment below; one that had been considered by the district court but not by the court of appeals. It therefore remanded the case for that purpose. Here, both lower courts considered the statutory claims and both decided them in the plaintiffs' favor. In such circumstances, it is hard to imagine a justification for the suggestion that the Court should ignore its "long standing practice against unnecessary constitutional adjudication" (State Brief at 26 n.17) and partake in just such an exercise. To the contrary, the plaintiffs suggest that this case is one in which it is particularly appropriate to apply the

Court's normal rules. Each of the questions presented by the state petitioner calls for the examination of broad constitutional issues, ranging from the constitutional standard for meaningful notice to that of judicial review. However, the statutory ground for the decisions below can fairly be read to obviate the need for consideration of any of the questions raised in the cross-petition. The issue of the appropriate standard of review to be employed is clearly resolved for cases premised on a statutory violation. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Further, even assuming *arguendo* that the need for notice in this case has not already been determined by *Goldberg v. Kelly*, 397 U.S. 254 (1970), and its progeny (Point IV, *infra* at 58-59), it would certainly be inappropriate to consider the issue in a case where, as even the cross-petitioner admits, federal law nevertheless requires that it be provided. State Brief at 33 n.18. Finally, although plaintiffs did not argue the point below, it seems a fair, if not necessary, inference that any statute that requires notice to be sent inherently contains the requirement that it be minimally legible and comprehensible to its intended recipients.¹¹ This being the case, the lower courts' holdings that § 2020(e)(10) required meaningful advance notice provides a statutory basis for all of the relief afforded by the district court and renders unnecessary the broad-based constitutional decision sought by the state petitioner.

Consequently, plaintiffs vigorously contend that the Court should not accept the invitation to ignore its rules in this case. Rather, it is respectfully submitted that the Court should

¹¹ In the context of notices of adverse action, the Secretary has required that the relevant information be provided "in easily understandable language." 7 C.F.R. § 273.13(a)(2). While the First Circuit found that a notice of adverse action was not required in this case, it is difficult to conceive of a rationale for assuming that Congress did not intend the same common-sense requirement to apply to the adequate advance notice mandated by § 2020(e)(10).

dismiss as improvidently granted the cross-petition for certiorari.¹²

B. The Lower Courts Were Correct In Determining That The December Notice Had To, But Did Not, Comport With The Requirements Of 7 U.S.C. § 2020(e)(10) And 7 C.F.R. § 273.12(e)(2)(ii)

Were this Court to review the statutory holding of the court of appeals, it would find it to be unquestionably correct. The purpose of § 2020(e)(10) within the Food Stamp Program, its language and structure, and its history all dictate the conclusion that it required the Department to send adequate advance notice of the reductions and terminations at issue here.

As noted earlier in the plaintiffs' overview of the Food Stamp Program, Congress has created a system in which the program's participants are the primary source of information, verification, and error detection and correction (*supra* at 3, 6). Section 2020(e)(10) is designed to be the primary vehicle for accomplishing the latter task. It mandates that a state agency provide aggrieved households with the opportunity to request a fair hearing to challenge any "action of the state agency under any provisions of its plan of operation as it affects the participation of such household in the food stamp program . . ." The section further provides that for "agency action[s] reducing or terminating [the household's] benefits within the household's certification period", "individual notice" shall be sent sufficiently in advance of the proposed "adverse action" to allow the family to request a hearing and thereby freeze its benefits at the level existing "immediately prior" to receipt of the notice. If a hearing is sought, benefits continue at the prior level unless and until an "adverse decision" is rendered. Through these provisions, households confronted with a proposed reduction or termination of their allotments are granted

¹² Plaintiffs, of necessity, nevertheless address in this brief each of the contentions raised by the cross-petition. They do not wish this to be construed as a concession that the cross-petition should be reached or that the statutory finding below is properly before the Court.

an entitlement to undiminished benefits until they have been afforded a meaningful opportunity to seek correction of any error that they may detect. So much of the statute's requirements have not been contested, either by the Commonwealth or the Secretary.¹³

Rather, the Secretary argues that § 2020(e)(10) does not apply to those situations in which large numbers of households are simultaneously confronted with an "agency action reducing or terminating . . . benefits", situations which he describes as "mass changes". This contention was rejected by the court of appeals and is unsupported by either the language or history of the section.

While conceding that notice and an opportunity to be heard are generally required by § 2020(e)(10), the Secretary attempts to support his narrow view of its scope by noting that "no notice or hearing procedures are prescribed by statute in the case of . . . 'mass changes' ". Federal Brief at 21. But this observation places the cart squarely before the horse. The point is that the statute provides no exception for so-called "mass changes". Section 2020(e)(10) by its terms addresses those situations in which a household is facing an "agency action reducing or terminating its benefits". This is an inclusive phrase that defines which actions trigger the requirement for advance notice and the opportunity to freeze one's benefit level by seeking a hearing. Its effect is nowhere limited by the number of participants who may find themselves in the same boat. If a "mass change" is one which results in an agency action reducing or terminating a household's benefits, § 2020(e)(10) by its plain terms is applicable to the situation.

The Secretary's suggestion that the statute somehow contains a hidden exception for what he terms "mass changes" is further belied by another provision of the same section. As the First Circuit found in its consideration of the statute, and as the Secretary acknowledges (Federal Brief at 4 n.5), Congress

¹³ Indeed, the state petitioner has chosen not to address the requirements of § 2020(e)(10) at all.

has granted state agencies one exception to the rule that adequate advance notice is required before a reduction of a household's benefits may be accomplished. That exception, however, is not for "mass changes". Rather, it is for those situations in which the reduction or termination is "clearly require[d]" by a "written statement" from the household itself. Even in such cases, notice is still required, but it may be provided "as late as the date on which the action becomes effective". Pursuant to the principle of *expressio unius est exclusio alterius*, it must therefore be presumed that this listed exception to the general rule is the only one that Congress intended. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978).

The Secretary also hints that the term "notice of adverse action" as used in the statute should be read as a term of art cryptically incorporating regulations that included the "mass change" exception (Federal Brief at 21). This contention was also raised below and rejected by the First Circuit. It is as untenable as the first; both because it does not comport with the rest of the language of § 2020(e)(10) and because it is premised upon a misreading of the legislative history of that section.

In the absence of "extraneous relevant aids to construction", Congress is presumed to have intended words to mean what they normally convey. *Rosenman v. United States*, 323 U.S. 658, 661 (1945); *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947). In the current case, it is clear that Congress was not using "adverse action" as a technical term. Before that term even appears, § 2020(e)(10) provides for the continuation of food stamp benefits to any household that timely requests a fair hearing after receiving "individual notice of agency action reducing or terminating its benefits". The sentence then goes on to provide that the household's benefits shall continue at the level "authorized immediately prior to the notice of adverse action" until such time as an "adverse decision" is rendered. From this it is apparent that the word "adverse" is being utilized in its normal fashion. When it first appears, in the term

"notice of adverse action", it is functioning as a shorthand reference back to the earlier phrase "notice of agency action reducing or terminating . . . benefits", which of course is an action adverse to a household. This internal analysis is confirmed by the imminent use of the word in the phrase "adverse decision", which clearly connotes nothing more than a decision contrary to the participant's claim. Thus, the very sentence in which the term "adverse action" appears provides the proof that "adverse" is used in its normal, every-day sense; not as a code word for the silent incorporation of an exception to the plain meaning of the statute.

Despite the language and structure of the Act, the Secretary implies that because Congress in 1977 legislated against the "backdrop" of regulations which contained "mass change" provisions, the notice and hearing language of § 2020(e)(10) should be read to have adopted those provisions by implication.¹⁴ Federal Brief at 21-22. This suggestion suffers from two weaknesses. First, Congress has demonstrated in other sections of the Act that it knows how to incorporate the Secretary's regulations when it wishes to do so. Thus, in 7 U.S.C.

¹⁴ The Secretary suggests that "Congress adopted the 'adverse action' procedures" in 1971 in response to *Goldberg v. Kelly*. Federal Brief at 21. Actually, only the first clause of the current § 2020(e)(10), providing the opportunity for a hearing to contest any agency action affecting a household, was added in 1971. Pub. L. 91-671, § 6(b) (adding what was then codified at 7 U.S.C. (Supp. II 1970) § 2019(e)(6)). The second clause, containing the notice language and providing the explicit entitlement to unreduced benefits pending a hearing was added in 1977 well after the legislative history relied upon by the Secretary was written. (See text, *infra* at 26). Nonetheless, it does appear that Congress assumed in 1971 that by providing the right to a fair hearing it was implicitly mandating prior adequate notice as well. While there is scant contemporaneous legislative history surrounding the 1971 amendment, Senator Leahy in 1977 described the fair hearing requirements of the 1971 Act as follows:

Prior notice of any intended reduction or termination in aid . . . must be given setting forth a brief statement of the facts and specific regulations relied upon for any proposed action, and insuring that aid shall continue unabated until a fair hearing decision is rendered. 123 Cong. Rec. 16344 (May 24, 1977) (debate on S.275, the Senate version of the Food Stamp Act of 1977) (emphasis added).

§ 2014(g), for example, Congress has provided that the "Secretary shall, [in determining rules for countable assets] follow the regulations in force as of June 1, 1982". No such intention to adopt wholesale the notice and hearing regulations in existence in 1977 is expressed in § 2020(e)(10), and, given Congress' demonstrated ability to achieve that result when desired, none should be implied. *F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 514-515 (1963); *Fedorenko v. U.S.*, 449 U.S. 490, 512 (1981).

Further, the Fair Hearings section of H.R. Rep. 95-464, *supra* at 288-289 (1977), relied upon by the Secretary to support his hypothesis regarding the meaning and narrowing effect of the "adverse action" language in § 2020(e)(10), in fact offers scant guidance. That part of the Report was actually written a year earlier in conjunction with the House version of the proposed Food Stamp Act of 1976 (H.R. 13613). See H.R. Rep. 94-1460, 94th Cong., 2nd Sess. 266 (1976). Because the 1976 bill proposed to adopt unaltered the 1971 fair hearing provisions of the Act, it contained no mention of the language at issue here. The report written in support of that bill, therefore, sheds no light on the meaning of the then nonexistent notice language of § 2020(e)(10). The Fair Hearings section of the 1976 Report was utilized *verbatim* in conjunction with the Food Stamp Act of 1977, which itself contemplated no change in the 1971 fair hearings section until, at the last minute, the current notice language was added during committee mark-up. H.R. Rep. 95-464, *supra* at 860. In these circumstances, H.R. Rep. 95-464 (1977) can offer little support for the hidden meaning that the Secretary would impute to words that were not yet imagined when the Report was drafted.¹⁵

¹⁵ Indeed, as the Secretary notes (Federal Brief at 22 n.23), the House Agriculture Committee as early as 1976 expressed its difficulty with the application of the Secretary's "mass change" procedures to the "massive changes" contemplated by the Act of 1977. Those changes were no different in kind than those enacted by OBRA in 1981, one of which is at issue here. Yet the Committee specifically rejected the use of the "mass change" provisions there. It is not possible to reconstruct whether the Committee's uneasiness with the "mass change" aspects of the Secretary's regulations ultimately led to the current specific notice provisions in § 2020(e)(10), but certainly that expressed uneasiness does not, given subsequent events, offer any support for the Secretary's theory of implied acquiescence.

That the phrase "notice of adverse action" was not used as a technical term is confirmed by both the Senate and House Conference Reports following the reconciliation between their respective versions of the Food Stamp Act of 1977. Sen. Conf. Rep. 95-418, 95th Cong., 1st Sess. 197 (1977) and House Conf. Rep. 95-599, 95th Cong., 1st Sess. 197 (1977) both provide:

The House amendment provides that—upon State agency notice of reduction or termination of its benefits during the certification period—any household that timely requests a fair hearing on such matter will continue to participate and receive benefits on the basis authorized immediately before notice of the adverse action until a fair hearing is completed and an adverse decision rendered, or until the current certification period expires, whichever occurs first. [emphasis added]

From the description of the provisions of the second clause in § 2020(e)(10), it is apparent that the statute contains no code words. Reference is first made to "agency notice of reduction or termination" of benefits, without any qualifiers. Then, it is explained that benefits will continue following a hearing request at the level authorized "immediately before notice of the adverse action". Thus, at least following reconciliation, the Food Stamp Act of 1977 contemplated notice and the opportunity to freeze one's benefits by requesting a hearing whenever a state agency sought to reduce or terminate a household's benefits. It could not have intended to utilize the phrase "notice of adverse action" as a term of art to limit those rights, for the Conference Reports do not even use that term. This contemporaneous legislative explanation of the 1977 amendment to § 2020(e)(10) dictates that the Secretary's suggestion that the statute should be read to contain a silent, wide-spread exception to its plain language must be rejected. *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, ___ U.S. ___, 103 S. Ct. 2717, 2731 n.28 (1983).

Thus, in light of the language, structure and legislative history of § 2020(e)(10), the First Circuit correctly concluded that it required advance notice of the reductions and terminations in this case. The only remaining issue then with regard to

the court's statutory holding is the question of the notice's content. The court of appeals found that the statute required notice that was sufficiently informative to allow a household to determine not only that it had a right to appeal, but whether or not there was any reason to exercise that right. This finding flows inexorably from the very purpose and structure of § 2020(e)(10) within the Food Stamp Act.

As previously discussed, Congress has not mandated that hearings be held whenever an agency wishes to take some action, only that they be available upon request. This allows the administrative process to function unimpeded in the vast majority of cases, but provides a household with the ability to challenge that process when it believes the agency is proceeding incorrectly with regard to its particular case. This conclusion is further supported by the second clause of § 2020(e)(10), which provides that in that subset of cases in which the proposed agency action is one of reduction or termination of benefits, the household may halt the proposed action and freeze its benefits at their prior level by requesting a hearing after receipt of "individual notice" of the proposed reduction. The only fair reading of the statute is that this provision contains the requirement for recipient-specific information found by the First Circuit.¹⁶

¹⁶ The term "individual notice" contained in 7 C.F.R. § 273.12(e)(2)(ii) first appeared in the Secretary's regulations in response to the amendments enacted by the Food Stamp Act of 1977, which contained the notice language now codified in the second clause of § 2020(e)(10). 43 Fed. Reg. 47846, 47915-47916 (October 17, 1978). While it appears that even then the Secretary sought to limit the advance notice requirements of § 2020(e)(10) by relegating the called-for "individual notice" to obscurity in a subsection of his newly restructured "mass change" regulations, he did seem to recognize that the notice would require recipient-specific information. Thus, § 273.12(e)(2)(ii) requires state agencies to continue benefits to a household that has requested an appeal "only if the issue being appealed is that food stamp eligibility or benefits were improperly computed." A household can not appeal on that basis, of course, unless it receives some indication of how its benefits were computed, so that it can ascertain whether it appears to have been done properly or not. It was upon this basis that both lower courts concluded that the December notice did not even comport with the minimal requirements of this regulation.

One of the definitions given for "individual" by Webster's Third New International Dictionary of the English Language, Unabridged (1971), at p. 1152, is:

individual, adj.: 2C: intended for one person . . . *applying to one person.* (emp. added)

What makes a notice individual to a given household is the information regarding the specific effect a proposed action will have on that household. In the case at bar, for example, it may well be that the benefits of thousands of program participants were reduced, but the amount of reduction for each household, and its accuracy, were entirely dependent upon the amount of each individual household's earned income [PA 77-78; 23-24]. Thus, to have meaning in this case, the requisite "individual notice" had to include at least the amount of the proposed reduction to each household and the earned income figure upon which that reduction was premised. Without that information, there was simply no rational basis for limiting requested hearings, and undiminished benefits, to those cases in which it appeared that the proposed reduction was based on a factually incorrect premise.

It is this ability of the household to check the factual underpinnings of a proposed agency action that is the cornerstone of the error detection and correction system created by Congress in § 2020(e)(10). It is a system that is of a piece with other provisions in the Act that make the program's participants the primary source of the information upon which agency decisions are based. However, this entire review mechanism is short-circuited if the notices of proposed reductions or terminations provided to households are not sufficiently informative to allow participants to make a rational decision regarding whether or not to appeal. Even the legislative history cited by the Secretary supports this conclusion. He points out that the House Agriculture Committee, in discussing the implementation procedures to be utilized in conjunction with the "massive changes" contemplated by the Food Stamp Act of

1977¹⁷, recognized that "hearings would, of course, be unnecessary in the absence of claims of factual error in individual benefit computation and calculation". H.R. Rep. 95-464, *supra* at 289. Federal Brief at 22 n.23. This recognition is important in two respects. First, it utterly refutes the Secretary's claim that Congress was unconcerned about individual errors resulting from "mass changes" in the way the program is defined or administered. Second, it establishes that Congress did indeed envision a system in which the fair hearing would address those cases in which "claims of factual error in individual benefit computation and calculation" were involved. It is difficult to fathom how such a claim of factual error can be made in good faith unless a household is provided with the factual basis of the proposed action and can compare that to what it knows (or even believes) to be correct.

Thus, the requirement of informative notice in the current case need not be inferred only from the assumed congressional solicitude for fair procedure. Rather, it is reflected in the language, structure and legislative history of the Act in general and § 2020 (e)(10) in particular. It is indeed, as the First Circuit concluded, a matter of common sense that a statute that provides the right to request a hearing after receipt of advance notice of a proposed reduction in benefits, contemplates a notice that allows its recipient to do more than guess whether or not to exercise that right [PA 24; 94-95].

Consequently, the proper relief to be afforded the plaintiffs in this case must be determined within the context of the federal statutory violation found by the court of appeals; either because that aspect of the court's judgment has not been appealed or because it is plainly correct.

¹⁷ Or, more accurately, the proposed Food Stamp Act of 1976. See text, *supra* at 26.

POINT II

THE PROSPECTIVE INJUNCTIVE RELIEF AFFORDED BY THE DISTRICT COURT WAS APPROPRIATE

Despite affirming the district court's conclusion that the notice at issue was statutorily inadequate, the court of appeals nevertheless reversed the prospective injunctive relief designed to insure future compliance with the Act's provisions. This aspect of the First Circuit's decision was based upon its belief that the Department had not acted in bad faith and would strive to provide adequate notice in the future [PA 37-38]. However, such action by a court of appeals runs counter to the consistent teachings of this Court regarding the breadth of a district court's equitable discretion and the correspondingly limited scope of appellate review. *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 634 (1953); *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).

"It is the historic purpose of equity to 'secur[e] complete justice' ". *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), quoting *Brown v. Swann*, 10 Pet. 497, 503, 9 L.Ed. 508 (1836). In achieving that end in response to an established statutory violation, a trial court should exercise its discretion in light of the objectives of the act, the good faith of the parties, the likelihood of recurrence of the illegal conduct, and the convenience of, and possible injuries to, the parties flowing from the issuance of an injunction. See *Hecht Co. v. Bowles*, 321 U.S. 321, 325, 326, 328-330, 331 (1944). An examination of the record in this case demonstrates that the district court was cognizant of each of these factors in fashioning its relief, and that it was therefore a clear abuse of authority for the court of appeals to substitute its judgment for that of the trier of fact.

As demonstrated in Point I, there was no dispute between the lower courts regarding the objectives of the relevant provisions of the Food Stamp Act. Both found that § 2020(e)(10) not only envisioned, but required, advance informative notice of any proposed agency reductions or terminations of a household's benefit allotment; notice sufficient to allow a household

to determine whether or not it should exercise the right to appeal afforded by the statute. Thus, this is not a case in which the reviewing court determined that the lower court's exercise of its injunctive powers was limited by or inconsistent with the act sought to be enforced.

Indeed, it is difficult to imagine in what respect that could be true. Far from contravening the objectives of the notice and fair hearing procedures set forth in § 2020(e)(10), the district court merely effectuated them by instructing the Department to provide meaningful information in an understandable manner. In doing so, the judge carefully arrived at a "nice adjustment and reconciliation between the competing claims" of the parties. *Weinberger v. Barcelo-Romero*, 456 U.S. 305, 312 (1982). He made specific findings that administratively it was both feasible and beneficial for the Department to issue notices that complied with the requirements of the injunction [PA 75-77, 94-95; Findings 84-86, Conclusion 16]. He also found the interest of the plaintiffs in receiving meaningful notice to be substantial [PA 87-88, 95; Conclusions 6, 17]. After weighing these factors, the judge determined that prospective injunctive relief was appropriate to protect the plaintiff class.

Nevertheless, the relief entered was minimally intrusive. It prescribed only the minimum information necessary to insure that program participants would be able to fulfill their Congressionally-intended role as the primary source of error detection and redress in their individual cases. It did not purport to circumscribe the manner in which the agency might go about providing the requisite information, leaving that decision instead to the Department itself. In fact, if the order of the district court is remarkable in any respect, it is only for the amount of restraint exhibited in it. As the First Circuit itself noted, other courts, when faced with similar challenges to inadequate notices, have reacted by issuing far more restrictive mandates. See e.g., *Banks v. Trainor*, 525 F.2d 837, 842 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976) (requiring a breakdown of income and deductions, factors relevant to determining net food stamp income, and a benefit chart in a

food stamp "mass change" situation) and *Dilda v. Quern*, 612 F.2d 1055 (7th Cir. 1980), cert. denied *sub nom.*, *Miller v. Dilda*, 447 U.S. 935 (1980) (requiring an agency worksheet to be sent in conjunction with changes in the Aid to Families with Dependent Children program). The trial court in this case, with regard to the content of future food stamp reduction notices, merely ordered the Department to provide sufficient information to give effect to § 2020(e)(10).

The Department was also instructed to establish standards for the form and comprehensibility of future notices. The court had before it uncontroverted expert testimony that the notice issued in this case was a "typographic abomination", exceeding by a wide margin virtually every typographic standard for legibility [JA 167-171]. The evidence further established that more than 80% of the plaintiff class had a high school education or less [PA 62, Findings 43-44; JA 127], and that public assistance recipients who have a twelfth grade education or less most probably cannot read at more than an eighth grade level [JA 32, 112-114]. Based both upon the experience of the Social Security Administration in drafting Supplemental Security Income notices at a sixth grade reading level and expert testimony at trial, the district court concluded that it was administratively feasible for the Department to draft notices at a fifth-sixth grade level [PA 76, Finding 85]. Nevertheless, the judge did not draw upon this wealth of uncontradicted data to formulate a specific decree. Rather, still mindful of "the competing interests of the parties", the court, subject to its review, offered the Department the opportunity to devise its own administratively workable rules to protect against the future issuance of illegible and incomprehensible notices.¹⁸

¹⁸ Because of the district court's cautious approach to this aspect of the relief, there is at present still no substantive order regarding the readability of future notices. It is therefore difficult to understand how the court of appeals could have concluded that this section of the decree was unduly burdensome to the Department, for it specified no substantive obligations with which the Department had to comply. Absent a determination that the district court was totally precluded under any circumstances from issuing relief in this area, objection to this portion of the order is premature.

It is thus apparent that the district court's decision to issue injunctive relief was entirely consistent with the purposes of the Food Stamp Act. Moreover, the remedy chosen represented a careful balancing of the plaintiffs' need for future protection and the Department's desire for the widest possible latitude in conducting its affairs. Nonetheless, the First Circuit reversed the granting of the injunctions, relying upon two closely related findings: the absence of a finding that the defendant had acted in bad faith, and the belief that the Department would strive to do better in the future. Neither rationale for the court of appeals' conduct can withstand scrutiny.

Evaluation of the good faith *vel non* of a defendant and the likelihood of voluntary compliance in the future are "question[s] best addressed to the discretion of the trial court." *U.S. v. W. T. Grant Co.*, 345 U.S. at 634. Further, as this court has repeatedly noted, the absence of bad faith (or even the presence of good faith) "does not affect whether an injunction might be issued . . . by a court possessed of jurisdiction." *Pennhurst State School v. Halderman*, ___ U.S. ___, 104 S.Ct. 900, 912 n.17 (1984); *U.S. v. W. T. Grant Co.*, 345 U.S. at 633. This is especially true in suits against government officials, where a finding of "bad faith" may result in personal liability.¹⁹ See *Wood v. Strickland*, 420 U.S. 308, 321-322 (1975); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819 (1982). The facts of this case underscore the significance of this point. At the time the December notice was prepared and issued, this action was already pending. The Department was on notice of exactly what information plaintiffs considered essential to make the notice meaningful (*i.e.*, the household's old benefit level, new benefit level and earned income). Nevertheless it did not even bother to ask its computer programmers whether this information could be included on the December notice [PA 74-75, Finding 83]. As it turned out, if the Department had merely requested that this information be included, it could have been done without difficulty or delay [PA 75-76, Finding

¹⁹ The former Commissioner of the Department of Public Welfare was sued in his individual capacity in this action.

84]. Hence, while the district court concluded that the Commissioner's predecessor did not act with the requisite bad faith to subject him to personal liability, it was also aware that the Department had not responded in such a manner as to instill confidence in its commitment to the provision of adequate notice in the future.

Thus, by focusing on the formalistic absence or presence of bad faith in this case, the First Circuit lost sight of the fact that "the historic injunctive process was designed to deter, not to punish." *Hecht Co. v. Bowles*, 321 U.S. at 329. The relevant inquiry is properly focused on the likelihood of a future violation, whether intentional or not, because preventing such recurrences is "[t]he sole function of an action for injunction." *U.S. v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952). In the current case, the district court had before it evidence of the Department's unwillingness even to inquire about issuing an adequate notice in December. In addition, it was aware of the Department's self-confessed susceptibility to computer chaos when large scale changes in program operations are undertaken. Under these circumstances, the judge concluded that an injunctive remedy designed to insure future informative, comprehensible notices was necessary to keep tomorrow's illegal conduct from becoming yesterday's irremediable act. Thus, absence of bad faith on the part of the defendant was simply immaterial to the purpose of the relief afforded, and certainly constituted an inadequate basis for the First Circuit's reversal of that relief.

The second factor upon which the court of appeals relied in lifting the injunctions was its belief that "the state will strive to provide constitutional notice in the future" [PA 38]. Even were the First Circuit's faith justified,²⁰ it would not suffice to preclude the injunctive relief afforded by the district court. First, the appellate court's focus is again misplaced. In *Califano v. Yamasaki*, 442 U.S. at 705, the Court noted that an injunction against the Secretary of Health, Education and Welfare was

²⁰ But see *supra* at 14 n.8.

appropriate to insure future compliance with an order that he provide pre-recoupment waiver hearings to Social Security recipients, even though his duty to comply was thereby enforceable by contempt and the likelihood that he would not voluntarily do so was deemed to be a "remote eventuality." This approach demonstrates what the First Circuit failed to consider. The issue is not whether the Department will strive to comply in the future, but rather what protection will be available to the plaintiffs should it fail to do so.

Further, this Court has often cautioned courts "to beware of efforts to defeat injunctive relief by protestations of repentance and reform." *U.S. v. Oregon State Medical Soc.*, 343 U.S. at 333; *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 131 n.25 (1969); *Houchins v. KQED, Inc.*, 438 U.S. 1, 25 n.13 (1978) (Stevens, J., dissenting). Here, of course, while the Department's attorneys suggest repentance, its interim conduct remains unreformed. Certainly the record is devoid of any assurance of future compliance. Thus the First Circuit's faith that the Department would try to do better in the future not only misses the conceptual mark, but is based upon unsubstantiated, and inappropriate, supposition.

Consequently, it can be seen that the district court entered injunctions that were carefully crafted to accommodate the needs of both the plaintiffs and the Department. The relief was no more intrusive than necessary to accomplish the objectives of 7 U.S.C. § 2020(e)(10), with which it was completely in harmony. That being the case, the district court's exercise of its remedial authority could only properly be reversed upon a "strong showing" of abuse of discretion. *U.S. v. W. T. Grant Co.*, 345 U.S. at 633. Unfortunately, the court of appeals appears to have lost sight in this case of its proper appellate function. Rather than applying the appropriate standards to ascertain whether the district court had indeed abused its discretion, the First Circuit seems to have viewed itself as a second trial court, free to substitute its remedial preferences for those of the first. However, the balanced approach demonstrated by the district court in this case should not be so lightly

reversed. Certainly to do so upon the surmise that the enjoined party will strive to do better in the future is completely inappropriate, for such an action substitutes the intuition of the appeals court for the hard weighing of facts, including the demeanors of the parties, undertaken by the trial court. Because the injunctive remedy fashioned by the district court fell well within the accepted bounds of equitable discretion, this Court should reverse the judgment of the First Circuit and reinstate the relief afforded to the plaintiffs following trial.

POINT III

THE DISTRICT COURT'S RESTORATION OF THE WRONGFULLY WITHHELD FOOD STAMP BENEFITS WAS ENTIRELY APPROPRIATE

In addition to the injunctive relief afforded the plaintiffs, the district court ordered the defendants to return to each household any benefits that had been withheld by the Department pursuant to the statutorily invalid notice of December 1981. Despite affirming that the December notice failed to provide the statutorily mandated "meaningful advance notice" [PA 29], the court of appeals reversed this relief as "unwarranted" because the plaintiffs had not proved that the underlying reductions were substantively incorrect [PA 33]. Plaintiffs contend that it is the First Circuit that erred, for the restoration of the wrongfully withheld benefits was indeed warranted; both as a proper execution of the command of Congress found in 7 U.S.C. § 2023(b) and as a proper exercise of the district court's discretion.

A. Restoration Of The Food Stamp Benefits Reduced Or Terminated In Violation Of § 2020(e)(10) Is Mandated By § 2023(b)

The propriety of restoring the food stamp benefits withheld pursuant to the invalid notice flows from the language of the statute that the Department violated. Both lower courts held that the December notice had not comported with the requirements of 7 U.S.C. § 2020(e)(10), and had thereby deprived

each affected household, in the words of the First Circuit, of its statutorily mandated "opportunity for review of the Department's calculations" underlying the proposed reductions or terminations [PA 37]. Nevertheless, the court of appeals appears to have concluded that if the underlying reductions or terminations were substantively correct, the fact that they were accomplished in violation of statutorily required procedures did not render them wrongful. Such a conclusion is incorrect both because it misperceives the nature of the entitlement afforded to program participants by § 2020(e)(10) and because it conflicts with a long line of decisions from this Court.

When Congress enacted the provisions of § 2020(e)(10), it obviously understood that it was creating a system in which most households would receive, for a time, benefits at a level that is substantively incorrect. This happens, or should happen, for example, each time an agency correctly proposes to reduce or terminate a participant's grant and gives the requisite advance notice of the proposed action. For the ten or more days between the mailing of the notice and the effectuation of the change, participants, even without appealing, receive more food stamps than that to which they are then substantively entitled. 7 C.F.R. § 273.13(a)(1).²¹ Of course, if a household does appeal a proposed action, its benefits are frozen at the level "authorized immediately prior to the notice" until the hearing is held and an adverse decision is rendered. 7 U.S.C. § 2020(e)(10). The benefits mandated during both of these periods are not paid because Congress felt they would normally be substantively correct, but rather because it decided that, in a need-based program, it was better temporarily to pay a potentially incorrect amount of benefits than precipitously to alter a household's allotment before offering it

²¹ This fact initially concerned some state agencies who were afraid that such payments would be considered overissuances. The Secretary reassured them, stating, "This is not the case because the advance notice requirement actually extends eligibility for this [then] 15-day period time (sic)." 36 Fed. Reg. 20146 (October 16, 1971).

a meaningful opportunity to challenge the factual assumptions underlying the proposed action.

Within this Congressional scheme, as both lower courts found, adequate notice is a necessary condition precedent, the very trigger, to a meaningful opportunity to exercise the right to request a fair hearing. See *Cole v. Young*, 351 U.S. 536, 551 (1956). While recognizing that the December notice had deprived its recipients of the required meaningful opportunity to contest, the court of appeals failed to realize that the Department had also thereby deprived those households of their substantive entitlement to receive their prior level of benefits until they were afforded that opportunity. Through the provisions of § 2020(e)(10), Congress has specifically indicated that it is prepared to pay for the procedural protections that it has mandated. It has stated that a household faced with a reduction or termination of its benefits is entitled to continued participation in the program at an undiminished level until it has been given a meaningful chance to contest the proposed action. Having determined that the plaintiffs were not given that opportunity, the First Circuit was not free to disregard their Congressionally-mandated entitlement to their prior level of benefits.

Even if one were to ignore the substantive entitlement granted by § 2020(e)(10), the action of the court of appeals could not be upheld in light of the provisions of 7 U.S.C. § 2023(b). There, Congress has provided that:

In any judicial action arising under this chapter, any food stamp *allotments* found to have been *wrongfully withheld* shall be restored only for periods of not more than one year prior to the date of the commencement of such action, . . . (emphasis added)

As discussed above, the First Circuit found that all of the plaintiffs' benefits had been reduced or terminated without the notice required by 7 U.S.C. § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii). Hence, even if one were to view the provisions of those sections as being purely procedural, the inquiry would still remain whether benefits withheld in violation of the

procedural protections provided by the Act and its implementing regulations are "wrongfully withheld" within the purview of § 2023(b). If so, then the return of those benefits is mandated. This inquiry in turn raises two questions. First, were benefits "withheld" from the plaintiffs within the meaning of the Act? Second, were they "wrongfully" withheld? Pursuant to the plain meaning of the words involved and a long line of cases from this Court the answer to both of these questions, and therefore the inquiry, is unequivocally yes.

Webster's Third New International Dictionary of the English Language, Unabridged (1971), at 2627, defines "withheld," in relevant part, as:

- 2: to desist or refrain from granting, giving, or allowing: keep in one's possession or control: keep back.

From this definition it can be seen that the very word "withheld" fairly contemplates a process more than a judgment about the ultimate result of that process. See *U.S. v. Dumas*, 149 U.S. 278, 284 (1893). If one desists²² from granting a benefit that another has been receiving, he has withheld that benefit. There is thus little doubt that a withholding occurred in the present case. Each of the plaintiffs was receiving a given food stamp allotment prior to the Department's action in December, 1981. Following that action, each household began receiving a lesser amount of benefits. The Department had obviously withheld the difference between those two amounts; not only within the understanding of Mr. Webster, but also within that of Congress, for the latter gave each program participant the right to challenge every such action undertaken by a state agency. 7 U.S.C. § 2020(e)(10).

Given that food stamps were withheld by the Department, the only remaining question is whether those allotments were "wrongfully" withheld because the action was accomplished in violation of the procedures set forth by Congress in 7 U.S.C.

²² The word "desist" itself primarily connotes the discontinuance of an ongoing activity. Webster's Third New International Dictionary at 612.

§ 2020(e)(10). The First Circuit answered this question in the negative, but the relevant case law indicates that its answer was incorrect.

The "disregard of the command of the statute is a wrongful act . . ." *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916). Agency action "in the teeth" of a statutory or regulatory provision is "lawless". *Estep v. U.S.*, 327 U.S. 114, 121 (1946). These general maxims are no less true when the rights violated are procedural rather than substantive, especially where the procedure is "mandated by the Constitution or federal law." *U.S. v. Caceres*, 440 U.S. 741, 749 (1979).

Even when an agency has achieved unquestionably permissible or "correct" results, this Court has consistently declared such actions to be wrongful²³ if they were accomplished in violation of published procedural safeguards designed to protect "the rights of individuals." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Service v. Dulles*, 354 U.S. 363, 373, 388 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 540, 545 (1959); see also *Yellin v. U.S.*, 374 U.S. 109, 121 (1963) (same result where rules were those of a Congressional subcommittee). While this line of cases will be discussed more fully in point III-B, *infra*, with regard to the inherent authority of the courts to remedy

²³ Black's Law Dictionary, Fifth Edition (1979) at 1446, defines "wrongful" as:

In a wrong manner; unjustly, in a manner contrary to the moral law, or to justice. (Emphasis added).

This surely encompasses how something is accomplished, as well as the underlying result achieved.

Webster's Third New International Dictionary, at 2642, is somewhat less direct regarding the meaning of "wrongful", although it does list UNLAWFUL as part of the definition. "Unlawful" is then defined in Webster's at 2502 as:

- 2: . . . disobeying or disregarding the law 3: contrary to normal or acceptable procedure.

The only procedure acceptable in this case, of course, is that mandated by Congress.

such procedurally defective actions, they are cited here merely for the unremarkable, common-sense proposition that actions taken in violation of federal statutory and regulatory procedural requirements are "wrongful".

This Court's decision in *Sampson v. Murray*, 415 U.S. 61 (1974), is particularly instructive in this regard. There, the plaintiff, a federal probationary employee with absolutely no claim that she had a substantive right to maintain her job, nonetheless alleged that she had been discharged without being afforded the proper civil service notice. She sought and was granted a temporary restraining order to prevent her discharge. Upon appeal this Court reversed. Noting that the Back Pay Act, 5 U.S.C. § 5596(b), provided restitution when a federal employee was found "to have undergone an unjustified or unwarranted personnel action", the Court concluded that the plaintiff had not demonstrated irreparable injury, for her loss of salary would be remedied if she ultimately prevailed on her claim that she had been discharged without the required notice. This conclusion was reached despite the fact that the plaintiff in *Sampson* did not even contend that if a factual mistake was discovered at her hearing she would then have a right to her job. Rather, as the Court recognized:

Respondent's claim here is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge. *Sampson*, 415 U.S. at 91.

Thus, the Court's action in *Sampson* establishes two points relevant to the current case. First, purely procedural violations may constitute "unjustified or unwarranted" action. Second, when a statute provides for the restoration of benefits lost pursuant to such agency action, violations of procedural rights, as much as substantive rights, trigger the mandated restitution.

Nor is there any reason why the word "wrongfully" in § 2023(b) should be read any more narrowly than those in the Back Pay Act. There is absolutely nothing to indicate that

when Congress referred to "wrongfully withheld" benefits, it meant to distinguish, *sub silentio*, between those provisions of the Act that provide substantive and procedural rights. Rather, there is every reason to conclude that the term "wrongfully" retains its normal definition, for in § 2020(e)(10) Congress has demonstrated its willingness to pay for the procedures that it considers necessary to protect individual participants from the inevitability of agency errors. In this context, it would stand the plain language rule of statutory construction on its head to find that the same Congress that provided households with the procedural protections of § 2020(e)(10) nonetheless did not intend their violation by state agencies to be "wrongful." Both common sense and the cases just cited argue strongly against such a conclusion.

Consequently, food stamp benefits withheld in contravention of 7 U.S.C. § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii) are "wrongfully withheld" within the meaning of § 2023(b). Because the language of the latter section is mandatory regarding the restoration of such benefits, the district court was entirely correct to order that remedy. That the relief was limited to the period of each household's existing certification or continued eligibility, whichever proved shorter, demonstrates that the district court was well aware of the overall scheme established in § 2020(e)(10). The remedy provided was thus exactly what was envisioned by Congress in § 2023(b). Correspondingly, it was a clear error for the court of appeals to reverse that relief based upon its belief that only those whose benefits were actually miscalculated, as determined by an after-the-fact reckoning, were entitled to the protections of the Act. Because Congress decided otherwise, the judgment of the First Circuit should be reversed and the relief afforded by the district court reinstated.

B. Restoration Of The Food Stamp Benefits Reduced Or Terminated In Violation Of 7 U.S.C. § 2020(e)(10) Was Well Within The District Court's Equitable Discretion

Even in the absence of the remedial language found in 7 U.S.C. § 2023(b), it was an entirely appropriate exercise of the

district court's discretion to restore the benefits that had been withheld in contravention of 7 U.S.C. § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii). Restitution has always been an available arrow in an equity court's remedial quiver, especially where, as here, its use furthers the purposes of a Congressional enactment. *Porter v. Warner Holding Co.*, 328 U.S. 395, 399-400 (1946); *Albermarle Paper Co. v. Moody*, 422 U.S. at 417. Section 2023(b) did not create the judicial power to restore food stamp benefits that have been wrongfully withheld. It merely imposed a durational limitation upon an already existing remedy;²⁴ one that had been previously utilized in so-called "mass change" situations to effectuate the prior adequate notice requirements found in the Food Stamp Act and its regulations. *Banks v. Trainor*, 525 F.2d at 840; *Willis v. Lascaris*, 499 F. Supp. 749, 760 (N.D.N.Y. 1980).

The rationale for the judicial restoration of wrongfully withheld benefits lies in the need to enforce the provisions of § 2020(e)(10). *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Both lower courts found that each plaintiff household had its benefits reduced or terminated without being afforded the requisite opportunity to contest. Because § 2020(e)(10) prohibits exactly this conduct by state agencies, restoration of the benefits withheld pursuant to the illegal conduct was not only appropriate, but necessary to give the section meaning. Until households have been given notice affording them a meaningful opportunity to contest a proposed

²⁴ The legislative history surrounding the passage of the Food Stamp Act of 1977, Pub. L. 95-113, demonstrates that Congress was aware of and explicitly endorsed judicial actions awarding retroactive benefits to households whose allotments had been incorrectly reduced or terminated. H.R. Rep. No. 95-464, *supra* at 283-284. This view is further confirmed by the legislative history surrounding the 1981 amendments to the Food Stamp Act. The Report of the House Committee on Agriculture, H.R. Rep. No. 97-106, 97th Cong., 1st Sess., 148-149 (1981), in discussing the provisions relating to restoration of lost benefits stated:

Currently, the Act requires the Department to restore in food stamps any household benefits which the State agency has wrongfully denied or terminated.

reduction or termination of their food stamps, Congress has assured them of undiminished allotments, whether or not that level of benefits ultimately proves to be substantively correct. Once violated, this statutory promise can only be enforced by restoring the *status quo* existent before the Department's unlawful action, and that is exactly what § 2023(b) requires. Congress clearly intended to restore benefits in this situation not only out of a sense of fair play, but also, and perhaps more importantly, to assure program participants that it was worth their while to bring illegal conduct to the attention of the agency and the courts. *Cf. Mitchell v. Robert De Mario Jewelry*, 361 U.S. at 292-293. Without this remedy, households have no incentive to do so, and are left to meekly suffer unauthorized agency conduct. In the current case, in fact, Mr. Parker's wife discouraged him from pursuing his complaint because she already believed that the Department would ultimately do what it wanted, whether or not the action was legal [JA 140]. It is just this fatalistic mentality that will be encouraged if benefits that were admittedly withheld illegally are nonetheless not returned. Given the Food Stamp Program's heavy reliance on the willingness of its participants to cooperate in good faith, Congress obviously recognized the importance of preventing the perception that the program's rules only apply to households, not to the administering agencies. For if such a perception becomes widespread, it is ultimately the integrity of the program itself that will suffer most.

This Court has often recognized that restoration of the *status quo ante* represents appropriate relief when the conduct of a government agency has been determined to have violated procedural requirements. In *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Court voided the denial of an alien's application for suspension of deportation because the Board of Immigration Appeals had not accorded him the impartial hearing dictated by the Attorney General's regulations. In doing so, the Court did not find that the alien was entitled to suspension of deportation, only that he was entitled to the protection of the relevant regulations governing the making of

that determination before it could be denied. Similarly, in *Vitarelli v. Seaton*, 359 U.S. 535 (1959), a government employee with no substantive right to his job was nonetheless reinstated because he had been discharged in violation of the applicable Department of Interior regulations. The Court was careful to note however that Mr. Vitarelli could again be discharged at any time following his reinstatement, pursuant to "any lawful exercise of the Secretary's authority." *Vitarelli*, 359 U.S. at 546; see also, *Service v. Dulles*, 354 U.S. 363 (1957). Hence, this Court has not hesitated to breathe life into statutory and regulatory procedural protections through the use of restitution.

Nor in the context of the current case does it exalt form over substance to restore the benefits withheld in violation of 7 U.S.C. § 2020(e)(10). The Food Stamp Act in general, and § 2020(e)(10) in particular, provide participants with both substantive and procedural rights. The provisions of § 2020(e)(10) were in existence when Congress enacted the program amendments contained in the Omnibus Budget Reconciliation Act of 1981. Nothing in the 1981 amendments indicates that Congress intended to repeal or temporarily suspend the requirements of § 2020(e)(10). Nor does anything in the latter section indicate that Congress contemplated that it would not apply to reductions or terminations undertaken by state agencies at its request. While OBRA certainly evinced an intent to reduce program expenditures, it cannot be read to have sanctioned a wholesale disregard of existing procedures for implementing those reductions. See *Levesque v. Block*, 723 F.2d 175, 184-85 (1st Cir. 1983). Thus, the district court was faced with the task of giving meaning to multiple provisions of the Food Stamp Act. Had the court not ordered the restoration of benefits reduced or terminated in violation of § 2020(e)(10), it would have subjugated that section of the Act to others containing only substantive rights. But it is a basic tenet of statutory construction that the provisions of an act are to be read together, affording to each its meaning and rendering none

superfluous. *U.S. v. Menasche*, 348 U.S. 528, 538-539 (1955).²⁵ Only by acting as it did could the district court completely respect the stated will of Congress, giving effect both to *what* it wished done and *how* it wished that to be accomplished.

Consequently, the district court acted correctly in returning the food stamp benefits withheld in violation of § 2020(e)(10). Whether viewed as the execution of the command of § 2023(b) or as the appropriate exercise of equitable discretion, restitution in this case fully effectuated the goals of Congress. Thus because the district court acted well within the bounds of its remedial authority, it was an error for the First Circuit to reverse the restoration of the wrongfully withheld benefits. *Weinberger v. Barcelo-Romero*, 456 U.S. at 320.

POINT IV

THE DECEMBER NOTICE FAILED TO AFFORD PARTICIPANTS THE PROCESS THEY WERE DUE

A. Plaintiffs Possessed A Property Interest Subject To Protection Under The Due Process Clause

This is not a case in which the plaintiffs have challenged the authority of Congress to decrease the amount of the earned income disregard that they had been receiving.²⁶ Neither is it a case in which any individual household is claiming that, because of its peculiar circumstances or hardships, it is unfair or unwise to apply the decreased earned income disregard to its earned income. This is simply a case in which each household has claimed the right to demonstrate that the amount or fact of

²⁵ The Court there stated:

It is our duty "to give effect if possible, to every clause and word of a statute" [citation omitted], rather than to emasculate an entire section, as the Government's interpretation requires.

²⁶ Were this the case, the arguments and cases relied upon by the Secretary in his brief at 19-21, would have some relevance. But because the plaintiffs seek only to have the admittedly valid change in the program applied correctly to their individual cases, the cases cited in support of the Secretary's contention are simply inapplicable here.

the specific proposed reduction in its individual case may have been premised upon "incorrect or misleading factual premises or on misapplication of rules or policies to the facts" of its case. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970).²⁷ Thus, despite the Secretary's protestations to the contrary, this case is in fact controlled by the decision in *Goldberg*. There, in discussing the rights to timely and adequate notice and the opportunity to defend, the Court's full statement was that:

These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.²⁸

²⁸This case presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where the application of the rule of law is not intertwined with factual issues. [Citation omitted] 397 U.S. at 268.

From the above it is obvious that *Goldberg* was not limited only to cases in which benefits were reduced or terminated solely because of a perceived recipient-specific change in factual circumstances. Rather, it contemplated as well situations where reductions might be challenged due to "the misapplication of rules or policies to the facts of particular cases."²⁹ Such situations are much more likely to occur following changes in the law, due both to the agency's unfamiliarity with the new rules and the confusion which ensues during times of massive changes in program policy (see *supra* at 4-5 n.3). Nothing in

²⁷ As both lower courts found, there was a high probability that the Department applied the new earned income disregard to the wrong amount of earned income for many of the households in the plaintiff class [PA 79, Finding 95]. Also, as the record proves, at least some members of the class were terminated from the program even though the Department was aware that they had absolutely no earned income to recalculate [JA 44].

²⁸ Indeed, footnote 15 implies that notice and at least some type of opportunity to contest are necessary even where the application of the rule of law implicates no factual issues.

Goldberg suggests that fewer procedural protections should be accorded when the benefits of many individuals are simultaneously in jeopardy.

The Secretary's effort to dismiss the need for notice because the Department was merely applying a new program policy to its existing data files obscures the real issue in this case. Shortly after *Goldberg* was decided, this Court summarily affirmed a three-judge court decision which rejected just such an argument. *Yee-Litt v. Richardson*, 353 F. Supp. 996, 1000 (N.D. Cal. 1973), *aff'd*, 412 U.S. 924 (1973). There, after reviewing a state agency's attempts to implement a "mass change" involving an adjustment in the treatment of non-exempt income, the court recognized that the critical issue was whether recipient-specific factual disputes could arise in the context of implementing the new policy. If so, it held, *Goldberg* applied and pre-termination hearings were required, no matter how many individual families might be affected by the policy change.

Consequently, at least where there is the potential that a factual mistake may have resulted in an incorrect reduction or termination of a need-based benefit, *Goldberg* found that the underlying statute afforded participants a legally protected expectation. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The property interest at stake is not, as the Secretary mischaracterizes it, the right to the continued receipt of any given amount of benefits, but rather the right to the receipt of the correct amount of benefits. The Court in *Goldberg* did not find that the agency intended to make errors; only that they nonetheless occurred. Since the individual victims of those errors could not be identified in advance, it was determined that all program participants must be given adequate prior notice and an opportunity to be heard before their need-based benefits could be reduced.²⁹

²⁹ The entitlement which the *Goldberg* court found to be implicit in the AFDC statute (42 U.S.C. § 602 *et seq.*) is explicitly provided by the Food Stamp Act at 7 U.S.C. § 2020(e)(10).

Despite the fact that the implementation of the earned income disregard by the Department resulted in incorrect terminations and reductions, the Secretary argues that no process is due in this case.³⁰ If this contention were correct, then not only is no notice required, but neither is a hearing, whether before or after the reduction or termination. Thus, the Secretary would have this Court hold that the family identified in the record [JA 44] that had no earned income but was nonetheless terminated from the program has no right to bring that obvious error to the Department's attention. In his view, they have two alternatives; either reapply for the program (and thereby sacrifice the benefits already incorrectly withheld without any notice) or petition Congress for the redress of their grievance.³¹ This draconian attitude finds no support in the case law.

While the right to notice and a hearing cannot and does not prevent administrative errors from occurring³², it does provide

³⁰ Cases cited by the federal respondent for this proposition are unhelpful. *Ohio State Consumer Ed. Ass'n v. Schweiker*, 541 F. Supp. 915 (S.D. Ohio 1982), was reversed on appeal and remanded for issuance of a new notice. *Ohio State Consumers Ed. Ass'n v. Schweiker*, No. 82-2111 (6th Cir. 3/26/82) (unpublished opinion). *Benton v. Rhodes*, 586 F.2d 1 (6th Cir. 1978), cert. denied, 440 U.S. 973 (1979), and *Seniors United for Action v. Ray*, 529 F. Supp. 55 (N.D. Iowa 1981) both found that a state could prospectively discontinue certain optional medical services it had previously chosen to provide recipients of Medicaid without affording them hearings prior to removing those services from the regulations. These decisions were based on the fact that no one was actually receiving, or had even applied for, the medical services that were being deleted from future coverage. Finally, the court in *Merriweather v. Burson*, 325 F. Supp. 709, 711 (N.D. Ga. 1970), aff'd in relevant part, 439 F.2d 1092 (5th Cir. 1971), in fact required the provision of advance notice and a hearing where the proposed reductions were premised upon individual factual predicates.

³¹ The prospect of millions of food stamp households seeking individual Congressional redress every time a duly enacted provision of the Food Stamp Program is misapplied in their cases is truly extraordinary. It is nonetheless what the Secretary suggests. Federal Brief at 20.

³² While acknowledging this rather self-evident proposition, *Mackey v. Montrym*, 443 U.S. 1, 13 (1979), recognized that "a primary function of legal process is to minimize the risk of erroneous decisions." Thus while a pre-

the victims of those errors with the opportunity to detect them and seek to have them corrected. That opportunity was all plaintiffs sought in this case and it is all they were afforded below. Due process requires no less.

B. The Notice Did Not Contain The Necessary Information

The amount of process due in any given case is defined by the demands of the particular situation. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The December notice did not state whether a recipient's food stamps were to be terminated or reduced [PA 71, Finding 73]. It did not state the amount of any reduction, nor did it tell anyone what his or her benefits would be following the change [PA 70, Findings 69 and 70]. It did state that the proposed termination or reduction was based on a different way of counting a family's earned income, but did not list the amount of earned income that the Department used in calculating the proposed change [PA 70, Finding 71]. The composition, language and printing of the notice were so difficult that it was incomprehensible to many, if not most, of its recipients [PA 96-97, Conclusion 20; PA 100, ¶ 1.c; JA 201-202].

In *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976), this Court identified several factors that must be evaluated in determining what procedures are constitutionally mandated.³³

deprivation hearing may not always be mandated, no case supports the proposition that pre-deprivation notice is not required, at least where the deprivation may be anticipated. Compare *Parratt v. Taylor*, 451 U.S. 527, 543 (1981) with *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-436 (1982).

³³ The Department raises a red herring by contending that it was error for the First Circuit to utilize the *Eldridge* analytical framework in a notice case. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950), the Court specifically noted the need to balance the interest of the individuals affected against those of the State while keeping in mind the value of additional procedure safeguards. Thus, *Eldridge* merely reflects a further refinement of the general analytical construct earlier identified in *Mullane*. To suggest that, because *Eldridge* was a hearing case, its analysis is not applicable here "erects an artificial barrier between the notice and hearing components of the constitutional guarantee of due process." *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 15 n.15 (1978).

Application of the balancing test described there to the facts found in this action dictates but one result: the December notice was woefully inadequate.

The first part of the *Eldridge* test requires evaluation of the private interest at stake. Both courts below found the plaintiffs' interest in receipt of the correct amount of food stamp benefits to be extremely significant [PA 87-88, Conclusion 6]. Neither defendant contests this determination.³⁴

The next prong of the test requires evaluation of two factors: "the risk of an erroneous deprivation through the procedures used and the probable value . . . of additional . . . safeguards." The district court found that "the risk of erroneous deprivation is high with the probable value of additional procedures great" [PA 95, Conclusion 17]. Consequently, the defendants come to this Court arguing not that the court below committed an error of law, but that it incorrectly evaluated the facts. As it has done so many times before, this Court should decline the invitation to retry the case on appeal. *Rogers v. Lodge*, 458 U.S. 613, 622-623 (1982); *Blau v. Lehman*, 368 U.S. 403, 408-409 (1962); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The district court's ultimate finding that the risk of error was substantial is based upon twenty-three subsidiary findings [PA 77-84, Findings 88-110]. The court explained that the

³⁴ The Secretary, however, could not resist the temptation to qualify his concession. Federal Brief at 36 n.32. Contrary to his contention, the earned income disregard does not constitute an addition to benefits. It merely represents a way of estimating the actual take-home pay of an employed participant, thus removing the disincentive to work which would otherwise result. See H.R. Rep. 95-464, *supra* at 61. Indeed, the Act itself limits participation in the program to those households whose incomes and resources are found to be "a substantial limiting factor in permitting them to obtain a more nutritious diet." 7 U.S.C. § 2014(a) (emphasis added). It is this need-based nature of the food stamp program which renders the reductions and terminations at issue here more significant than those at issue in *Eldridge*, for here there was no fall-back program to which affected households could turn.

following factors all contributed to its conclusion regarding the high risk of error: the admitted confusion in the Department and its computer component (B.S.O.) during the latter part of 1981; the substantial data entry backlog which plagued the Department from October through December of 1981; the programming errors identified in the random sample of the 902C Report; and the December notice's total lack of meaningful information, which made it impossible for affected household's to detect and correct possible errors [PA 89-91, Conclusions 9-11]. The defendants maintain that neither the data entry backlog nor the errors identified in the random sample are relevant to the risk of error. Both contentions are wholly without merit.

The defendants do not contend that the data entry backlog did not exist. They argue instead that the existence of incorrect data in recipients' files had no effect on the accuracy of the reductions or terminations flowing from the change in the earned income disregard. However, as the district court explicitly found, "The specific earned income of a given household was a factor in determining the amount of that household's benefit reductions . . ." (emphasis added) [PA 77-78, Finding 90]. The court understood that if the earned income figure was wrong, the amount of the actual reduction due to the application of the new earned income disregard would also be wrong. It is for this reason that both the district court and the court of appeals found that the substantial data entry backlog contributed to the high risk of error.³⁵

Indeed, it is a strange argument that less process is due where, as here, the agency is "merely" compounding an exist-

³⁵ The courts below were clearly focusing only upon the accuracy of the actual amount of the reduction rather than any pre-existing benefit level error. This is convincingly demonstrated by the fact that the only required information found to be missing from the December notice was the amount of the benefit reduction and the amount of earned income to which the new disregard was applied [PA 100, ¶ 1(a); 26-27]. The earned income amount is the only recipient-specific bit of data relevant to the accuracy of the specific reduction, as opposed to the overall accuracy of the benefit allotment.

ing error. This is especially true where the Department has itself caused the data base error by failing to do what it was required to do with information already reported by households. It is, in fact, the height of audacity to allege that less notice is due in the current case, when the Department knew in advance that it had a substantial data entry backlog, that the B.S.O. was severely understaffed and that the computer programming necessary to implement this change was complex [JA 221-223]. In such error-prone circumstances, due process certainly does not condone a wholly uninformative notice.

The defendants' attack upon the results of the random sampling is equally unavailing. First it is urged that, because the random sample included seventeen pages from a different report³⁶, the study is rendered useless. Federal Brief at 30. Nothing could be farther from the truth. Those seventeen pages contained 370 cases, not one of which suffered an erroneous reduction or termination of benefits. If those pages are deleted, the minimum programming error rate detected by the study actually increases from 4.2% to 4.5%.³⁷ Thus, this "error" merely enhances the lower courts' conclusions.³⁸

The defendants next assert that all of the households identified in the random sampling were also affected by a detected error in the treatment of the \$10.00 minimum benefit, and therefore suffered no loss. This contention is clearly refuted by

³⁶ It should be noted that the Department provided plaintiffs with the copy of the 902C report upon which the random sample was conducted. Any error in the contents of the report is due to the Department's negligence in producing the voluminous document.

³⁷ It is important to realize that either of these figures is more than twice as high as the defendants claim is normal in the overall operation of the program [PA 77, Finding 88]. Since all parties seem to agree that *Goldberg* was concerned at least with those cases in which the agency seemed prone to making errors, it is illogical at best to argue that the decision should not apply to a situation in which the *minimum* detected error rate is over twice as high as in those situations to which everyone agrees it does apply.

³⁸ This is because the number of detected improper reductions remains constant at 211 while the sample size decreases from 5013 to 4643.

the record. This additional programming flaw reduced below the \$10.00 minimum the actual issuance of food stamp benefits (ATP's) to one and two person households [JA 49]. However, because the minimum benefit was only available to households which remained eligible for some allotment, terminated households could not have been affected by it. 7 C.F.R. § 273.10(e)(ii)(C). But of the two households with no earned income shown on the sample page of the 902C Report [JA 44], only one suffered a reduction of benefits. That family might have been affected by the minimum benefit error.³⁹ The other household, though, was terminated and therefore unentitled to any minimum benefit. Moreover, a further review of the sample page uncovers a third household, not identified in the random sample because it had earned income, whose benefits were reduced below ten dollars. Because of the \$10.00 minimum benefit rule, this reduction, too, was apparently erroneous.

This additional class of programming errors confirms what plaintiffs have always maintained and what the district court recognized: the random sample identified only those programming errors which logically flowed from the nature of the change (i.e., reductions or terminations of families with no earned income) and therefore established only the *minimum* programming error rate [PA 82, Finding 105]. The existence of additional programming mistakes and the undetectable data base flaws underscore the conservative nature of the district court's evaluation of the risk of error.

Thus, the defendants' efforts to insulate these actions from the dictates of due process because they were implemented by computers can not be justified. In *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 18 (1978), this Court took judicial notice of the fact that "the risk of an erroneous depriva-

³⁹ There is not one shred of evidence in the record to establish that, in actual fact, even one of the 211 households identified in the random sample ever had its erroneous reduction corrected. Because such evidence, if it existed, was within the Department's possession, their failure to introduce it creates the negative inference that it did not exist.

tion, given the necessary reliance on computers, is not insubstantial." This record bears testament to the wisdom of that conclusion, for it establishes that here, at least, computerization only compounded the Department's woes.

The second factor to be considered in assessing the need for additional procedural safeguards is the degree to which such added protection will in fact have some value. Here the district court had the benefit of evidence that is not normally available to a court in reaching its conclusion. The unchallenged testimony of Dr. Mark Bendick, a world-renowned expert on the administration of public assistance programs (with a subspecialty in error and fraud prevention), was that errors could have been detected and avoided in the main through the simple expedient of telling the affected households the amount of their prior benefit, the amount of their new benefit, and the amount of earned income upon which the Department calculated the reduction [JA 95-96].

The district court found that without this information recipients could not even discover any mistakes, much less attempt to have them corrected [PA 70-71, Finding 72]. Based on the above, and in accord with numerous other courts that have considered the issue, both courts below reached the obvious conclusion: the provision of a notice with sufficient information to allow its recipient to determine if a mistake has been made is a valuable safeguard in assuring that such mistakes do not go undetected and thus uncorrected [PA 24, 91, 94-95]. See e.g., *Gray Panthers v. Schweiker*, 652 F.2d 146, 172 n.55 (D.C. Cir. 1980); *Philadelphia W.R.O. v. O'Bannon*, 525 F. Supp. 1055, 1060 (E.D. Pa. 1981); *Willis v. Lascaris*, 449 F. Supp. at 759.

The third part of the test enunciated in *Eldridge* calls for evaluation of the government's interest, including the fiscal and administrative burdens incident to provision of additional procedural safeguards. While in some cases this consideration may counter the need for otherwise advisable procedures, in the case at a bar exactly the opposite proved true. Dr. Bendick

testified, and the district court found, that informative notices operate to reduce confusion among clients, and thereby reduce the number of phone calls and visits to the agency that seek nothing but clarification. This in turn frees up the time of caseworkers for other functions [PA 76-77].

Further, there was no administrative or fiscal burden attached to issuing an adequate notice. The defendants did not even argue that a proper notice would have been more expensive [PA 92-93, Conclusion 14]. Indeed, the Department's own computer expert testified that including the necessary information in the notices would have been an easy task, even with all of the problems B.S.O. was then facing, and would not have delayed the implementation of the earned income deduction change [PA 74-76, Findings 82 and 84]. Consequently, the district court was correct in concluding that the "governmental interest in not providing an informative notice is minimal at best" [PA 94-95, Conclusion 16].

Hence, it can be seen that the courts below identified the proper standard to be used in evaluating the process due the plaintiffs in this case and then applied that standard to the facts as they were shown to be. They then concluded that as a matter of constitutional law:

notice of reduction or termination of need-based public assistance benefits must, at a minimum, inform the recipient of the actual amount of benefits being taken away and the relevant information necessary to ascertain whether an error has been made [PA 97, Conclusion 21].

This finding is entirely consistent with the very purpose of notice, as well as with the relevant case law.

Procedural due process has several components. *Eldridge*, 424 U.S. at 325 n.4. The first of these is "timely and adequate notice." *Goldberg*, 397 U.S. at 267. In order to be adequate, a notice must do more than merely inform its recipient that he or she has the right to request a hearing or even that a hearing

will be held without a request.⁴⁰ *In re Gault*, 387 U.S. 1, 33-34 (1967). Rather, it must contain sufficient information to "permit adequate preparation for an impending 'hearing.'" *Memphis Light*, 436 U.S. at 14; *Wolff v. McDonald*, 418 U.S. 539, 564 (1974); *In re Gault*, 387 U.S. at 33-34. This is because notice serves a different purpose than the hearing itself. It represents the stage of any process at which one must be able to detect an error. If sufficient information is not given to allow a person to evaluate the proposed action, the "right to be heard has little reality or worth" because it is impossible to make an informed decision "whether to appear or default, acquiesce or contest."⁴¹ *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). See also, *Goss v. Lopez*, 419 U.S. 565, 581 (1975). As Judge Weinstein of the Eastern District of New York recently recognized with regard to Medicare procedures, informative notice "is essential to due process, for if notice is inadequate other procedural protections become illusory." *David v. Heckler*, #79 C 2813 (E.D.N.Y. 7/11/84), slip op. at 24, citing *Gray Panthers v. Schweiker*, 716 F.2d 23, 32 (D.C. Cir. 1983).

It is not surprising then that virtually every court that has considered the reduction or termination of need-based benefits in mass change situations implicating individual factual issues has agreed with the courts below that, at a minimum, due process requires notice of the amount of benefits being taken away and sufficient information to ascertain whether an error is being made. *Banks v. Trainor*, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975); *Philadelphia W.R.O. v. O'Bannon*, 525 F. Supp. at 1060-1061; *Jones*

⁴⁰ *Memphis Light*, 436 U.S. 1 (1978), does not provide authority to the contrary. In *Memphis*, the contents of the notice were not at issue. *Memphis* simply holds that a notice must inform its recipients not only of the factual bases for the proposed action but also of the available avenues for redress.

⁴¹ As the courts below found, every single appeal in this case was premised upon a blind guess. As the cases cited in the text declare, due process requires more.

v. Blinziner, 536 F. Supp. 1181, 1197-1199 (N.D. Ind. 1982); *Buckhanon v. Percy*, 533 F. Supp. 822, 833-837 (E.D. Wis. 1982), aff'd in part and rev'd in part on other grounds, 708 F.2d 1209 (7th Cir. 1983), cert. denied, 104 S. Ct. 1281 (1984); *Willis v. Lascaris*, 499 F. Supp. at 760; *Malanson v. Wilson*, #79-116 (D. Vt. 8/12/80), slip op. at 10-11; *Dilda v. Quern*, 612 F.2d 1055 (7th Cir. 1980), cert. denied *sub nom.*, *Miller v. Dilda*, 447 U.S. 935 (1980). These cases recognized that the critical focus was not on how many people were being affected by a given change, but rather on the likelihood that mistakes could be made in implementing it.⁴² They concluded, as did the lower courts in this case, that the factual premises for decisions must be revealed if they are relevant to the outcome of a proposed agency action. As noted in Point IV-A, this is the very conclusion mandated by *Goldberg v. Kelly*.

C. The Notice Was Not Reasonably Designed To Convey The Required Information

The court of appeals and the district court both concluded that the December notice was also constitutionally inadequate because "[i]t was written at such a level of difficulty and in such a format as to be incomprehensible to many of its recipients" [PA 100]. They reached this conclusion by applying the facts of this case to the standard set forth in *Mullane v. Central Hanover Bank & Trust*, 339 U.S. at 314-315, where this Court stated that a "notice must be of such nature as reasonably to convey the required information" and that "[t]he means employed must be such as one desirous of actually informing the [recipient] might reasonably adopt to accomplish it." These excerpts demonstrate that our jurisprudence has long deman-

⁴² The decisions in *Banks*, *Buckhanon*, *Philadelphia W.R.O.* and *Willis* are particularly instructive. All four cases involved "mass changes" in the Food Stamp or AFDC Programs. In each case the agency implemented the change based on pre-existing data in its files. The notices in *Banks* and *Buckhanon* were much more detailed than the notice at issue here, while those in *Philadelphia W.R.O.* and *Willis* were virtually identical. However, in each case the court concluded that due process required additional information.

ded that a notice must not only contain the "required information", but must also "reasonably convey" that information in a manner likely to be understood. In the view of both lower courts, the December notice did neither.

This conclusion was based upon overwhelming evidence. Plaintiffs produced uncontested and unimpeachable data that demonstrated that 45.8% of all heads of Massachusetts food stamp households with earned income (the recipients of the December notice) have not completed high school, while 82.2% of that same group have a twelfth grade education or less [PA 62, Findings 43 and 44; JA 127]. They also introduced uncontradicted data and testimony indicating that public assistance recipients who have a twelfth grade education or less quite probably cannot read at more than an eighth grade level [JA 32-33, 112-114].⁴³ Neither of the defendants has questioned the validity of any of this evidence on appeal.

Both the plaintiffs and the state defendant employed experts to test the reading difficulty of the December notice and each testified at the trial. Both agreed that any meaningful analysis of a given passage's difficulty involved both a quantitative (statistical regression formulae) and qualitative (syntax, construction, etc.) evaluation [PA 56, 63, Findings 28 and 47]. The district court credited the testimony of the plaintiffs' expert in finding that pursuant to the most widely used reading formula, the Dale-Chall test, page one of the December notice tested quantitatively at the 9-10 reading grade level, while page two tested at the 11-12 reading grade level [PA 57-58, Findings 31 and 32]. That the court chose to believe the plaintiffs' expert in this case is not surprising in light of the fact that defendant's expert submitted five samples of his analysis; four of which contained errors in his client's favor [III CAA 223, 225, 234-244, 293-298].⁴⁴

⁴³ For a similar conclusion regarding the comprehension level of the elderly poor, see *David V. Heckler*, slip op. at 9-10.

⁴⁴ Having lost on the established facts below, the defendants have now gone to great lengths before this Court to call into question the validity of the Dale-Chall reading test. This approach overlooks the fact that the December

Plaintiffs' expert further testified that, taking into account subjective factors, the December notice was actually much more difficult to understand than would be expected from the quantitative evaluation alone, so that it was "unlikely that high school graduates could read and understand" it [JA 201].⁴⁵ Since 82.2% of the class members have only a high school education or less, that is the percentage that could not be expected to understand the notice sent to them. Consequently, based on language considerations alone, the district court's declaration that the notice was incomprehensible to many of its recipients was in fact an understatement.

Unfortunately, opaque and misleading language was not the notice's only shortcoming. The trial court, relying on undisputed testimony of plaintiffs' typography expert, found that the notice was printed in unacceptably small type,⁴⁶ and util-

notice, when evaluated pursuant to several other widely recognized readability formulae, tested at an even higher level of difficulty [PA 60-61, Findings 39-41]. Further, the government's current attack calls into question the research and wisdom of the Secretary of Health and Human Services, who, as the record established, utilized the Dale-Chall test in rewriting S.S.I. notices of reduction and termination at a fifth-sixth grade reading comprehension level. 46 Fed. Reg. 42337, 42339 (August 20, 1981).

⁴⁵ Both defendants have religiously avoided dealing with the damning evidence regarding the qualitative difficulty of the December notice, despite the fact that their own expert testified that it was a crucial part of any meaningful analysis (and then chose to offer no opinion on the subject with regard to the December notice). Plaintiffs' expert found that the language of the notice would leave readers feeling like they were "reading a legal document . . . similar to . . . an insurance policy or a mortgage contract." [JA 29] See in this regard, *David v. Heckler*, slip op. at 27 (because Medicare notice uses language that resembles "officialese, federalese and insuranceese, . . . [i]t does not qualify as English.")

⁴⁶ The type in the December notice was almost exactly half the size required in this Court. Supreme Court Rule 33. It was also far smaller than that allowed by the Massachusetts Insurance Law, M.G.L. ch. 175, § 2B.1(b), the Retail Installment Sales Act, M.G.L. ch. 255D, § 9A, and the New York statute governing all consumer contracts and residential leases. N.Y. Civil Practice Law and Rules, § 4544. In fact, three of the witnesses were forced to use magnifying glasses just to make out the words [JA 140, 195; III CAA 128, ¶ 7].

ized grossly overlong line lengths with inadequate space between those lines [PA 68-69, Findings 63-65]. Further, three of the notice's four sides employed all capital letters, while one page was overinked and the other was underinked [PA 69, Findings 66 and 67]. There is simply no question that the courts below were totally justified in concluding that these factors all "served to increase the difficulty of reading and understanding the December notice" [PA 96-97, Conclusion 20; PA 21].

The approach utilized below in determining that the December notice was unconstitutionally deficient fits securely within the contours of this Court's prior teachings. On numerous occasions it has been recognized that the form of process that is acceptable in a given situation depends in part upon the capacities and circumstances of those to whom the process applies. Such is certainly the message of the *Mullane* case, and is one that was reiterated more recently in *Goldberg*, 397 U.S. 268-269, where the Court found that appeal by written submissions was "an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively."

That plaintiffs' education and comprehension level is a valid and necessary consideration in establishing the type of notice due them was again suggested in *Memphis Light*, 436 U.S. at 14, n.15. There, in determining that the notice at issue was not sufficiently clear to comport with due process, the Court opined that in different circumstances perhaps a less clear notice would suffice, but that:

Here, however, the notice is given to thousands of customers of various levels of education, experience and resources. Lay consumers of electric service, the uninterrupted continuity of which is essential to health and safety, should be informed clearly . . .

This fundamental concept that a notice must be considered in light of those receiving it when determining whether it is in fact adequate has been recognized by numerous lower courts. See e.g., *Gray Panthers v. Schweiker*, 552 F.2d at 167; *Viverito v. Smith*, 474 F. Supp. 1122, 1131-1133 (S.D.N.Y. 1979); and *David v. Heckler*, 79 C 2813 (S.D.N.Y. 7/11/84). It is a con-

clusion that comports with both common sense and the relevant case law of this Court, and is therefore one that the lower courts in this case were amply justified in reaching.

In the face of this factual and legal cornucopia of support for the findings of the district court, the defendants, while agreeing that *Mullane* provides the appropriate legal standard, nonetheless baldly proclaim that the December notice was reasonable. They assert that it was improper for the lower courts to measure reasonableness in the manner that they did, but they offer absolutely no alternative approach. It is apparently their belief that only they can decide that issue, utilizing undeclared standards that are impervious to judicial review. In support of this hypothesis, each misstates what the Department has been required to do and raises the specter of unlimited litigation and administrative efforts aimed at producing "the best notice possible." State Brief at 48.

The lower courts required no such thing. They were concerned with the minimum acceptable notice, not with what might possibly be done under ideal circumstances [PA 27-28]. That their evaluation was accomplished after-the-fact is of course inherent in the process of judicial review, and will remain the case no matter what standard is employed. Nonetheless, the trial court merely directed the Department to develop its *own* workable standards for future comprehensible notices.⁴⁷ Once such standards are established, the Depart-

⁴⁷ The Department's suggestion that the decision of the court of appeals will require it to "engage in . . . market research" each time it issues a notice is absurd. State Brief at 46. The decision requires nothing more than a reasonable effort to write notices in simple, understandable language. This can largely be accomplished by utilizing a little common sense. (Compare the notice appended hereto at Appendix C, p. 12a, with the December notice [JA 4-5]). Furthermore, should the Department opt to use a readability formula, computer software is readily available for evaluating reading difficulty pursuant to all of the major reading tests. Indeed the Dale-Chall, Flesch and Fogg tests can be performed on home computers. Feldman and Casteel, *Using Microcomputers to Determine Readability Levels*, 20 *Journal of Reading Improvement* 82 (Summer 1983).

ment, by conforming its actions to those standards, will be less, rather than more, vulnerable to future litigation.

As all parties seem to agree, what is constitutionally mandated is that notice reasonably convey the required information. It is the historic and unique function of the courts to decide whether that constitutional requirement has been violated in a given case. That is all the lower courts did in this case, and they did so based on a plethora of evidence to inform their decisions.

Because the December notice did not contain the information necessary to allow households to make an informed decision about an appeal, and because the information that it did contain was written and presented in such a way as to make it incomprehensible to the majority of its recipients, this Court should affirm the decisions below which found that such a notice does not comport with the requirements of due process.

POINT V

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO THE FINDINGS OF THE DISTRICT COURT

In a final effort to extricate itself from the overwhelming burden of the evidence produced in the district court, the Department argues that the court of appeals erred in reviewing the record under the "clearly erroneous" standard set forth in Fed. R. Civ. P. 52(a). The Rule provides an inappropriate guide, in the Department's view, for two reasons. First, the facts determined by the district court are not deemed to be of the historic type normally subject to the Rule. Second, those facts are perceived as so interrelated with the relevant legal framework as to require, at least in the context of constitutional litigation, independent review. State Brief at 78-79, 83. Addressing these propositions in reverse order, it can be seen that both are demonstrably incorrect.

Rule 52(a) of the Federal Rules of Civil Procedure provides:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Nothing in the text of the rule nor the decisions of this Court declares a general exception for factual determinations made in the context of constitutional adjudication. In *Rogers v. Lodge*, 458 U.S. at 622-623, the Court applied the clearly erroneous rule in reviewing a finding that the defendants had intentionally maintained a racially discriminatory at-large electoral system in violation of the Equal Protection Clause of the Fourteenth Amendment. Despite the fact that the finding of discriminatory intent involved numerous inferences applied within a complex legal framework (*Rogers*, 458 U.S. at 617-622), Rule 52(a) was found to provide the appropriate standard of appellate review. Similarly, in *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 534 (1979), this Court applied Rule 52(a) to a finding of discriminatory animus in an equal protection challenge to a segregated school system. *Accord, Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 468 (1979) (Burger, C.J. concurring); *see also, Memphis Light*, 436 U.S. at 16. These cases demonstrate that the Department's reliance on *Watts v. Indiana*, 338 U.S. 49 (1949), and *Bose Corp. v. Consumers Union*, ___ U.S. ___, 104 S. Ct. 1949 (1984), is misplaced in support of its general contention that Rule 52(a) is an inappropriate vehicle for review in cases involving constitutional issues. Neither of those cases stands for so broad a proposition.

The *Bose* case involved a determination of actual malice in a case governed by *New York Times v. Sullivan*, 376 U.S. 254 (1964), and the holding was expressly limited to that situation. *Bose*, 104 S. Ct. at 1967. The narrow exception to Rule 52(a) carved out by *Bose* was predicated upon the premier position of the First Amendment among our constitutional liberties. *See Bose*, at 1961. The fundamental importance of protecting free speech is reflected in the heightened burden of proof, by clear and convincing evidence, required to establish actual malice. Rule 52(a) has been held to provide a less useful vehicle for reviewing facts subject to such an exacting evidentiary stand-

ard. See *Baumgartner v. U.S.*, 322 U.S. 665, 671 (1944). However, none of the above considerations are present in the current case and *Bose* is therefore inapposite.

In *Watts*, this Court considered whether the circumstances surrounding the acquisition of a confession rendered that confession involuntary. However, the Court did not independently review the factual record. To the contrary, it was noted that:

... any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore, only those elements of the events and circumstances . . . that are unquestioned in the State's version of what happened are relevant to the constitutional issue here.

Watts, 338 U.S. at 52.

Thus, the cases relied upon by the Department simply will not support the contention that Rule 52(a) is inappropriately applied in cases involving constitutional adjudication. In fact, this Court has expressly rejected the suggestion that it should "play a special oversight role in reviewing factual determinations . . . in school desegregation cases," noting that to do so would assert "an omnipotence and omniscience that we do not have and should not claim." *Columbus Bd. of Ed. v. Penick*, 443 U.S. at 457 n.6. As *Columbus* was decided on a constitutional basis, there is certainly no reason in the current case to depart from its teaching of restraint.

In support of its alternative argument, regarding the nature of the facts at issue, the Department cites two findings of the district court which it feels do not represent the types of factual determination that ought to be reviewed pursuant to Rule 52(a). These are the findings concerning the comprehensibility of the December notice and the risk of error surrounding the reductions and terminations that it attempted to announce. However, both of these determinations were predicated upon exactly the kind of historic facts that fall within the ambit of

Rule 52(a). For proof of this contention, one need look no further than the Department's attempts to undermine those findings.

As to the factual finding that the December notice was incomprehensible to many of its recipients, the Department attacks the reliability of the reading difficulty test utilized by the district court. It must do this, of course, for if the test is valid, its conclusion regarding the difficulty of the notice, when compared to the established education levels of the plaintiff class, demonstrates beyond dispute the accuracy of the district court's finding. There are, however, several problems with the Department's approach. First, neither it nor its counsel have demonstrated that they are in any way qualified to evaluate the reliability of a reading test.⁴⁸ Second, the Department's own reading expert testified that he considered the Dale-Chall test to be the most accurate available [JA 236]. Finally, this Court has specifically held that Rule 52(a) is especially appropriate in cases involving expert testimony because "so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 610 (1950). Thus, the Department's attack on this aspect of the findings below demonstrates exactly why Rule 52(a) was appropriately utilized in this case.

The belated attempt to discredit the concurrent findings of the district court and court of appeals regarding the substantial risk of error is equally unavailing. Contrary to the Department's representation, the record in fact demonstrates that a minimum of 745 households (over 4.5%) were erroneously reduced or terminated due to ascertainable computer pro-

⁴⁸ Indeed, to imply that the absence of certain food stamp terms from the Dale list of familiar words somehow undermines the trustworthiness of the test bespeaks a profound misunderstanding of the nature of statistical regression formulae in general and the Dale-Chall test in particular [JA 190-193, 207, 210, 236-237].

gramming errors⁴⁹ [PA 82-83, Finding 107; JA 44]. This figure of course does not begin to reflect the additional predictable mistakes resulting from the Department's self-confessed data entry backlog throughout the relevant period of the benefit reductions [PA 78-80, Findings 91-97]. In response to this avalanche of data reflecting the administrative chaos at that time, the Department cites this Court to yet another computer programming error and claims that because it allegedly corrected that flaw, the district court's findings should be deemed worthless. However, the very purpose of both Rule 52(a) and the two court rule is to insulate this Court from just such *post hoc* sniping at the record and findings made below. As the Court has stated:

A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank, 336 U.S. at 275.

The Department's tardy attempt to undermine the factual premises of the district court's findings has in fact revealed nothing approaching a reversible error. It has, however unwittingly demonstrated the wisdom of applying Rule 52(a) to the present case.⁵⁰ Therefore, the Court should affirm the standard utilized by the First Circuit in its review of the findings of the district court.

⁴⁹ This minimum figure for the class is derived by extrapolation from the 211 cases identified in the random sample.

⁵⁰ Were this court to accept the invitation to undertake an independent review of the record, plaintiffs suggest that it, like the court of appeals, would find "ample support" for the findings and conclusions of the district court [PA 21].

CONCLUSION

The judgment of the court of appeals should be affirmed on the merits, but the relief granted by the district court should be reinstated.

Respectfully submitted,

STEVEN A. HITOV
J. PATERSON RAE
Western Mass. Legal Services
145 State Street
Springfield, MA 01103
Tel. (413) 781-7814

Dated: August 24, 1984

APPENDIX

APPENDIX A

The statutory and regulatory provisions relevant to this case provide:

1. 7 U.S.C. §§ 2020(e)(10):

(e) The State plan of operation . . . shall provide . . .

(10) for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program or by a claim against the household for an overissuance; *Provided*, That any household which timely requests such a fair hearing after receiving individual notice of agency action reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits on the basis authorized immediately prior to the notice of adverse action until such time as the fair hearing is completed and an adverse decision rendered or until such time as the household's certification period terminates, whichever occurs earlier, except that in any case in which the State agency receives from the household a written statement containing information that clearly requires a reduction or termination of the household's benefits, the State agency may act immediately to reduce or terminate the household's benefits and may provide notice of its action to the household as late as the date on which the action becomes effective;

2. 7 U.S.C. § 2023(b):

(b) In any judicial action arising under this chapter, any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action, or in the case of an action seeking review of a final State agency determination, not more than one year prior to the date of the filing of a request with the State for the restoration of such allotments or, in either case, not more than one year prior to the date the State agency is notified or otherwise discovers the possible loss to a household.

3. 7 C.F.R. § 273.12(e)(2)(ii):

(ii) A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change. If a household requests a fair hearing, benefits shall be continued at the former level only if the issue being appealed is that food stamp eligibility or benefits were improperly computed.

APPENDIX B

AP-84-5

DATE: 2/10/84

TO: ASSISTANCE PAYMENTS STAFF

FROM: JOLIE BAIN PILLSBURY, ASSOCIATE COMMISSIONER FOR ELIGIBILITY OPERATIONS

RE: *EFFECT OF THE 1983 SOCIAL SECURITY AND/OR SSI COST-OF-LIVING ADJUSTMENT ON NPA FOOD STAMP RECIPIENTS*

A cost-of-living adjustment (COLA) of 3.5% was reflected in the Social Security (RSDI) and Supplemental Security Income (SSI) benefit checks received by recipients in the month of January 1984. Therefore, food stamp benefits must be adjusted to reflect the increased payment rates.

An automatic COLA will be performed by the Department for a select group of cases with the March issuance to reflect the increased RSDI and/or SSI payments. Certain NPA households that contain an SSI recipient cannot be automatically updated because the system cannot identify which household member(s) is the SSI recipient in households containing more than one member. The benefits for these households and households with an end-of-certification date of 2/29/84 through 3/13/84 must be manually adjusted by the field.

This memo explains the procedures that will be used to adjust the food stamp benefits of NPA households, the notification procedures, and the worker's responsibilities. Households have been broken into two groups according to the household size and the benefits received, for the automatic or the manual adjustment.

Five separate printouts will be sent to the field listing the cases that were automatically adjusted and the cases requiring manual adjustment. The printouts will list cases active on the RMF as of 2/4/84.

CASES AUTOMATICALLY ADJUSTED BY THE SYSTEM

The cases described below will have the March food stamp benefits automatically adjusted by the system the weekend of 2/18/84.

* * * * *

NOTIFICATION PROCEDURES AND WORKER RESPONSIBILITIES — SYSTEM ADJUSTED

Demonstration Unit Cases

Recipients will receive a system-generated notification letter by 2/27/84 that will contain the old food stamp amount, the new food stamp amount, as well as an appeal form.

By 2/23/84, a printout entitled "DEMO CASES COLA 1984-FS ADJUSTMENT LISTING" will be produced and sent to the Demonstration Unit identifying every case that was automatically adjusted.

If there are any recipient questions regarding the change, the worker is to recalculate food stamp eligibility using the most current data, including the new SSI/RSDI amount. If the computer-calculated benefit is incorrect, enter the new data directly into the system. The system will generate proper notice to the recipient of the change in the food stamp benefit level. If a timely appeal is filed, the Division of Hearings will notify the unit. The worker must enter code 1 into the system which will prevent the transaction from being released.

Category 9 Cases

Category 9 cases that are automatically adjusted will be notified of the change (reduction or termination) on 2/27/84. A copy of the notice appears as attachment A. This notice will be produced in English and Spanish and will be mailed with a multilingual insert of 11 languages. The name and address card will contain the old food stamp amount, the new food stamp amount, the date of the mailing, and an appeal form. Timely appeals must be filed within ten (10) days of the date of the mailing.

If a timely appeal is filed, the Division of Hearings will notify the office. The worker must complete a TD with the information that was on file prior to the automatic adjustment to restore benefits to the prior amount and issue any lost benefits by means of a V-7.

Two (2) printouts will be produced and sent to the field the week of 2/20/84 identifying every case which was selected for the automatic adjustment. Case names are appearing on two (2) printouts because two separate computer systems (FMCS and ADABAS) are involved in the adjustment and therefore, the lists could not be consolidated. The printouts are entitled "FS ADJUSTMENT — ADABAS" and "ADJUSTED FS LISTING — FMCS."

If there are any recipient questions regarding the change, the worker is to recalculate food stamp eligibility by using the most current data, including the new RSDI and/or SSI amounts. If the computer-calculated benefit is incorrect, the worker must submit a TD and send proper notice to the recipient of the change in the food stamp benefit level.

NOTIFICATION PROCEDURES AND WORKER RESPONSIBILITIES — MANUAL ADJUSTMENTS

Manual Adjustment Printouts

Two (2) printouts will be produced and sent to the field the week of 2/13/84 identifying every case requiring manual adjustment. Case names are appearing on two (2) printouts because two separate computer systems (FMCS and ADABAS) are involved in the adjustment and therefore, the lists could not be consolidated. The printouts are entitled "FS MANUAL LISTING — ADABAS" and "FS MANUAL LISTING — FMCS." The printouts reflect information on the RMF as of 2/4/84.

Error Listing Reports

During the week of 2/27/84, a printout entitled "FS ERROR LISTING — SSA 1984 COLA" will be sent to the field identify-

ing cases that had been selected for an automatic adjustment but because of missing or inaccurate information, the system was prevented from automatically adjusting the benefit level or cases whose income exceeds the gross or net standards of eligibility. Cases appearing on this listing will require a manual adjustment of the benefit level to be effective for the April ATP.

Category 9 cases with a household of one member receiving SSI benefits that were selected for an automatic adjustment will appear on the 1070 report if the system was prevented from updating the benefit level because of the missing or inaccurate information.

Worker Responsibilities

The worker must determine from the case record if the recipient is receiving RSDI and/or SSI payments or which household member(s), if any, receives SSI payments. The worker may determine the current SSI amount by assessing the VDT "D" and "E" screens. If the name on the screen matches, the worker must review the record procession date. If the record processing date is 12/09/83 or later, go to "E" screen. The "SSI Monthly Amount" that appears in the bottom left-hand corner of the screen indicates the SSI grant. Any RSDI payment is shown under "Type" with Code A and the "Frequency" must be C. The grant is calculated by adding the SSI and RSDI amounts. The "E" screen also contains other income data which should be reviewed to determine if discrepancies exist between the data and the information contained in the case record. The "D" and "E" screens were updated to reflect the 1/1/84 SSI data on 1/19/84.

If the name does not match or the processing date is 12/08/83 or earlier, the worker must send the attached letter to the recipient to request the current SSI and/or RSDI amounts. See attachment B. All letters requesting SSI and/or RSDI benefit amounts must allow the recipient ten (10) days to respond. The worker must enter the due date for the verification(s) in the space provided.

If the recipient is receiving RSDI benefits only or if the household is receiving RSDI benefits that exceed \$999.00 when the 3.5% increase was added to the RSDI amount currently on file, the worker must send the attached letter to the recipient requesting the current RSDI amount. See attachment B. All letters requesting the RSDI amounts must allow the recipient ten (10) days to respond. The worker must enter the due date for the verification(s) in the space provided.

Upon determination of the SSI/RSDI amounts from the VDT screen or receipt of the verification, the worker must recalculate the food stamp benefit level by using the new SSI and/or RSDI amounts. Workers must use the gross RSDI amount which is the amount of the check (net) plus the Medicare B premium.

The basic Medicare B premium was increased to \$14.60 in January. Workers must complete and submit a TD with the new data and notify the recipient of the resultant change on the attached SSA/SSI/FS letter. See Attachment C. A mass action change based on an increase in RSDI or SSI benefits does not require a ten (10) day advance notice for an adverse action but the SSA/SSI/FS letter must be received by the recipient on or before the date of the ATP change. The worker completes one (1) original and two (2) copies of the letter, sends the original and one (1) copy to the recipient, and retains a copy for the case record.

If the review results in no change in benefit level the worker must notify the recipient that the benefit level will remain the same by sending an FSNL-3.

The effective date for the last digit of 0 through 4 may not permit the food stamp changes to become effective in March for cases in which the recipient is required to submit verification. In these cases, the changes will be effective for the month of April. All other cases will have the benefit level adjusted for March.

If a timely appeal is filed, the Division of Hearings will notify the office. The worker must complete a TD with the information that was on file prior to the adjustment to restore benefits to the prior amount and issue any lost benefits by means of a V-7.

ATTACHMENT A

Commonwealth of Massachusetts
Department of Welfare

2/29/84

Social Security benefits and SSI benefits were increased in January 1984. You and/or a member of your family are listed on our files as receiving Social Security (green check), SSI (gold check) or both.

The Welfare Department is required by law to reduce your food stamp benefits because of this increased income. This reduction means that your March food stamps will be less or will be stopped. The enclosed card shows both the old and new amount of the food stamp benefits you will get.

Food Stamp Manual Citation: 106 CMR 363.220(B), 364.600, and 366.130(D).

IF YOU DISAGREE WITH THIS DECISION, you have the right to a fair hearing before a referee of the Department of Public Welfare. To ask for a hearing you must sign and date the enclosed card, which has your name and address on it, and mail it to: Department of Public Welfare, Division of Hearings, P.O. Box 167, Essex Station, Boston, MA 02112.

Your request must be received by the Welfare Department *no later than 90 days from the date of this notice*. You may represent yourself, or be represented by a lawyer, friend, relative, or other spokesperson. You can contact your local welfare office to find out where to get free legal advice if any is available in your area.

YOUR BENEFITS WILL BE CONTINUED in your present amount until the end of the month in which your hearing is decided **IF YOUR REQUEST IS RECEIVED NO LATER THAN 10 DAY FROM THE DATE OF THE NOTICE** and if you are saying that the amount of your food stamps was incorrectly computed. However, if your food stamp certification period ends before the month of the hearing decision, you will continue to receive the same amount of food stamp benefits only until the period ends.

If you want a hearing, and for a good reason are unable to ask for a hearing by the time stated above, you can still ask for a hearing and receive food stamps in your present amount. To do this, you must be able to show that your reason for being late was a good reason.

If the referee decides that the Department's decision is right, the Department may recover any excess benefits paid to you on your behalf during the hearing process.

If you want to discuss our decision or ask any questions about how a fair hearing works, contact your local Welfare Office.

ATTACHMENT C

The Commonwealth of Massachusetts
Executive Office of Human Services
Department of Public Welfare

NAME _____ DATE _____
ADDRESS _____ AREA/BRANCH OFFICE ADDRESS _____
CITY/ZIP _____ SSN _____

Social Security (green check) and Supplemental Security Income (SSI) (gold check) benefits were increased in January 1984. You and/or a member of your family are listed on our files as receiving Social Security, SSI, or both. Because of this increased income, we have recalculated your food stamp benefits.

Effective with your _____ food stamps, your benefits will be

☐ reduced from _____ to _____ ☐ terminated

Food Stamp Manual Citation: 106 CMR 363.220 (B), and 366.130 (D).

IF YOU DISAGREE WITH THIS DECISION, you have the right to a fair hearing before a referee of the Department of Public Welfare. To ask for a hearing you must sign and date the enclosed card, which has your name and address on it, and mail it to: Department of Public Welfare, Division of Hearings, P.O. Box 167, Essex Station, Boston, MA 02112.

Your request must be received by the Welfare Department *no later than 90 days from the date of this notice*. You may represent yourself, or be represented by a lawyer, friend, relative, or other spokesperson. You can contact your local welfare office to find out where to get free legal advice if any is available in your area.

YOUR BENEFITS WILL BE CONTINUED in your present amount until the end of the month in which your hearing is decided **IF YOUR REQUEST IS RECEIVED NO LATER**

THAN 10 DAYS FROM THE DATE OF THE NOTICE and if you are saying that the amount of your food stamps was incorrectly computed. However, if your food stamp certification period ends before the month of the hearing decision, you will continue to receive the same amount of food stamp benefits only until the period ends.

If you want a hearing, and for a good reason are unable to ask for a hearing by the time stated above, you can still ask for a hearing and receive food stamps in your present amount. To do this, you must be able to show that your reason for being late was a good reason.

If the referee decides that the Department's decision is right, the Department can recover benefits paid to you during the hearing process.

If you want to discuss our decision or ask any questions about how a fair hearing works, contact your local Welfare Office.

Food Stamp Worker

I wish to appeal this food stamp action.

SIGNATURE: _____ DATE: _____

Deseo apelar accion tomada con las estampillas de de alimentos.

FIRMA: _____ FECHA: _____
SSA/SSI/FS

APPENDIX C

The Commonwealth of Massachusetts
Executive Office of Human Services
Department of Public Welfare

NAME _____ DATE 3-2-84
ADDRESS _____ AREA/BRANCH OFFICE ADDRESS
CITY/ZIP _____ SSN _____

Social Security (green check) and Supplemental Security Income (SSI) (gold check) benefits were increased in January 1984. You and/or a member of your family are listed on our files as receiving Social Security, SSI, or both. Because of this increased income, we have recalculated your food stamp benefits.

Effective with your April food stamps, your benefits will be
☒ reduced from 67 to 19 ☐ terminated

Food Stamp Manual Citation: 106 CMR 363.220 (B), 364.600 and 366.130 (D).

IF YOU DISAGREE WITH THIS DECISION, you have the right to a fair hearing before a referee of the Department of Public Welfare. To ask for a hearing you must sign and date the enclosed card, which has your name and address on it, and mail it to: Department of Public Welfare, Division of Hearings, P.O. Box 167, Essex Station, Boston, MA 02112.

Your request must be received by the Welfare Department *no later than 90 days from the date of this notice*. You may represent yourself, or be represented by a lawyer, friend, relative, or other spokesperson. You can contact your local welfare office to find out where to get free legal advice if any is available in your area.

YOUR BENEFITS WILL BE CONTINUED in your present amount until the end of the month in which your hearing is decided **IF YOUR REQUEST IS RECEIVED NO LATER THAN 10 DAYS FROM THE DATE OF THE NOTICE** and if

you are saying that the amount of your food stamps was incorrectly computed. However, if your food stamp certification period ends before the month of the hearing decision, you will continue to receive the same amount of food stamp benefits onlv until the period ends.

If you want a hearing, and for a good reason are unable to ask for a hearing by the time stated above, you can still ask for a hearing and receive food stamps in your present amount. To do this, you must be able to show that your reason for being late was a good reason.

If the referee decides that the Department's decision is right, the Department can recover benefits paid to you during the hearing process.

If you want to discuss our decision or ask any questions about how a fair hearing works, contact your local Welfare Office.

Food Stamp Worker

SIGNATURE: _____

DATE: _____

REPLY BRIEF

Office - Supreme Court, U.S.
FILED
SEP 28 1984
ALEXANDER L. STEVAS,
CLERK

① ⑨
Nos. 83-6381 and 83-1660
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

GILL PARKER, et al.,
Petitioners,
v.
JOHN R. BLOCK, SECRETARY
OF AGRICULTURE, et al.

CHARLES M. ATKINS, COMMISSIONER OF
THE MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE,
Petitioner,
v.
GILL PARKER, et al.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE STATE PETITIONER

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607/1/1

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 83-6381
GILL PARKER, et al.,
Petitioners

v.
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ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

This case is before the Court on cross-petitions for a writ of certiorari. This brief will serve as the state respondent's brief in No. 83-6381, as well as the reply in No. 83-1660. The first part of this brief responds to Parker's

claim that certiorari was improvidently granted because of an independent statutory basis for the challenged judgment. The remainder of the brief addresses the remedy issues presented by Parker's petition (No. 83-6381).

SUMMARY OF ARGUMENT

I. This Court properly granted certiorari to review the significant constitutional questions raised by the decisions which held that the notice of a legislative change in the Food Stamp Program did not satisfy the Due Process Clause because of its language, format, and content.

There is no controlling statutory issue which obviates the need for review of this constitutional question. The lower courts' determination that the notice was not adequate under the Food

Stamp Act does not provide an alternate basis for sustaining the judgment below; the opinions themselves, as well as the legislative history of the notice and hearing provision, clearly demonstrate that the statutory and constitutional standards are interwoven.

The language and history of the Act's general notice and hearing provision show that the lower courts wrongly decided this issue. The provision addresses administrative actions to reduce or terminate a particular household's benefits; it does not address across-the-board legislative changes in the program. In any event, the statute is silent as to the form and content of any notice, and instead, leaves such determinations to the Secretary and the states.

The Court may properly review

whatever statutory issue exists in this case. While not stated as a separate question for review, the statutory issue is, nonetheless, fairly included within the constitutional question presented by the Commissioner's petition as well as the remedy questions presented by Parker.

II. The Court of Appeals properly reversed the District Court award of retroactive food stamp benefits to the entire class of 16,000 households. An award of retroactive benefits is unrelated to the finding of an inadequate notice and is not designed to restore the plaintiffs to the position they would have been in had they received a different type of notice; retroactive benefits would be simply a windfall to the plaintiffs.

Congress intended that the restoration of benefits provision of the Food

Stamp Act provide for retroactive benefits if a household has not received its substantive entitlement to food stamp benefits. They are not available where a household, receiving the correct benefit amount, has been denied a procedural protection afforded by the Act.

III. The Court of Appeals also properly reversed the extraordinary permanent injunction entered by the District Court mandating the form and content of future notices and requiring the state to draft regulations for its approval governing the comprehensibility and legibility of notices. The injunction was also inconsistent with Congress' unmistakable intent to leave the determination of the format and content of notices under the Food Stamp Program to the Secretary and the states. A declaration setting forth

the basic requirements for an adequate notice sufficiently protects the rights of food stamp households; the District Court injunction imposed an unwarranted and unnecessary intrusion and burden on the state.

ARGUMENT

I. CERTIORARI WAS NOT IMPROVIDENTLY GRANTED; THIS COURT CAN AND SHOULD REVIEW AND REVERSE THE CONSTITUTIONAL REQUIREMENTS FOR FOOD STAMP NOTICES ANNOUNCED BY THE LOWER COURTS.

After concluding that the Department's December notice announcing a legislative change in the Food Stamp Program was unconstitutional under the Due Process Clause of the Fourteenth Amendment, the Court of Appeals added that, for much the same reasons, the notice did not meet the requirements of the notice and fair hearing provision of the Food Stamp Act,

7 U.S.C. § 2020(e)(10). Parker argues that this limited statutory determination provides an adequate and independent basis for sustaining the judgment below but, because the Commissioner did not specifically include this statutory issue in his questions presented for review, this Court is foreclosed from considering that matter and the dominant constitutional issue involved in this case.^{1/}

Neither claim is correct.

A. The Food Stamp Act Does Not Provide An Adequate And Independent Basis For Invalidating The December Notice.

Review of the lower courts' suggestion that the December notice violated

^{1/} Parker raised these same claims in his brief in opposition to the Commissioner's cross-petition for a writ of certiorari. Brief in Opposition at 1-3.

the notice and fair hearing provision of 7 U.S.C. § 2020(e)(10) reveals that such determination cannot provide an independent basis for the judgment, particularly because the statutory assessment is inextricably interwoven with the constitutional holding.^{2/}

^{2/} The relevant portion of § 2020(e)(10), as amended by Pub. L. No. 95-113, § 1301, 91 Stat. 958, 972, provides:

"for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program or by a claim against the household for an overissuance: Provided, That any household which timely requests such a fair hearing after receiving individual notice of agency action, reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits on the basis authorized immediately prior to the notice of adverse action. . ."

The District Court opinion contains no discussion of statutory standards. Instead, it merely notes, without comment, analysis, or legal support, that "[t]he December notice violated the timely advance notice requirements of 7 U.S.C. Section 2020(e)(10) and 7 C.F.R. Section 273.12(e)(2)(ii)." PA. 98.^{3/} Similarly, the Court of Appeals, after an elaborate discussion of the Due Process Clause, briefly adds that § 2020(e)(10) requires advance notice.^{4/} As to the statutory

^{3/} The lower court decisions are reprinted in the Appendix to the Commissioner's Petition for a Writ of Certiorari which is referred to as "PA." The Joint Appendix is referred to as "JA."

^{4/} It remains unclear from the Court of Appeals opinion whether it actually found the December notice to be untimely. PA. 29-31. The notice was mailed on December (footnote continued)

requirement for the notice's content, the court relied solely upon the constitutional analysis and inferred a congressional intent not to create an unconstitutional notice provision:

The district court found the December notice unconstitutional because the notice failed to convey meaningful information to affected recipients. We believe the notice failed to satisfy statutory requirements for the same reason -- the notice in question failed to inform recipients. We doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement and thus we affirm the district court conclusion that the December

(footnote continued)

24, 1981, well in advance of the effective date of the reduction and provided households ample opportunity (13 days) to appeal and thereby continue to receive their higher benefits. PA. 47, 49. Any argument that this was not advance notice is untenable, particularly as the timing of the December notice exceeds even the 10-day advance notice required of individual adverse actions. Cf. 7 C.F.R. § 273.13.

notice failed to satisfy the [statutory] notice requirements. . . . PA. 31.

Contrary to Parker's claim (Brief at 19), there is no further discussion of the statute's language and structure as it relates to the content of notices. The only case relied upon by the Court of Appeals for this statutory holding is Philadelphia Welfare Rights Organization v. O'Bannon, 525 F. Supp. 1055 (E.D. Pa. 1981), which found Pennsylvania's mass change notice invalid only on due process grounds. Consequently, the opinion fails to establish or even imply that its statutory determination provides an alternate basis for its judgment.^{5/}

^{5/} Cf. Michigan v. Long, 103 S. Ct. 3469, 3476 (1983) (decision does not rest upon an adequate and independent state

(footnote continued)

A fair reading of the notice and hearing provision also supports the Department's view that there is no independent statutory basis for the opinions of the lower courts. The language of § 2020(e)(10) does not link the statutory standard for adequate notice with the constitutional standard. Nevertheless, the legislative history makes the necessary connection and supports the lower courts' interweaving of the statutory and constitutional issues involved here. The House Report on the 1977 amendments to the Food Stamp Act states that Congress enacted the notice and

(footnote continued)

ground where it "fairly appears to rest primarily upon federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion").

hearing provision of the Act to comply with the constitutional requirements set forth in Goldberg v. Kelly, 397 U.S. 254 (1970):

Under the Food Stamp Act of 1964, as amended by the 1970-1971 amendments, each state agency must . . . provide "for the granting of a fair hearing and the prompt determination thereafter to any household aggrieved by the action of . . . State agency. . . . This change in legislation came about in response to a Supreme Court decision, Goldberg v. Kelly, 397 U.S. 254 (1970), which ruled that when a welfare recipient's benefits are terminated by administrative action, the recipient has a constitutional right to an evidentiary hearing to contest the termination. H.R. Rep. 95-464, 95th Cong., 1st Sess. 285-86, reprinted in 1977 U.S. Code Cong. & Ad. News 2220-22.

As the legislative history makes clear, the notice and hearing provision was added to the Act to ensure that the basic due process requirement of a hearing, as outlined in Goldberg v. Kelly, was incorporated into the Program.

In short, because the statutory and constitutional issues are totally interrelated in both the legislative history and the reasoning of the Court of Appeals, and because there is no indication by the Court of Appeals that its reference to the statute provides an independent ground for its decision, there is no adequate basis for the decision below to be affirmed without reaching the questions presented in the Commissioner's petition.

B. The Food Stamp Act Does Not Mandate The Form And Content Of Notices Announcing A Legislative Change In Benefits.

Even if the statutory basis for invalidating the December notice could stand on its own as an independent basis for the actions below, the statutory issues were wrongly decided and should

be reversed. The Court of Appeals based its statutory conclusion not on the plain language of the Act or its history, but rather on its belief that Congress could not have intended the enactment of a notice provision which "violated" the constitutional standards it was announcing for the first time.

Certainly, the plain language of § 2020(e)(10) does not support the conclusion that a mass change notice must contain recipient-specific information or must not be written above a particular reading level. The words "individual notice" are merely used to trigger the household's duty to timely request a hearing in order to continue to receive the higher benefit amount.^{6/} The

^{6/} The relevant notice language upon which Parker relies states: "Provided,

(footnote continued)

section neither defines individual notice nor mandates the form and content of that notice.^{7/} At bottom, § 2020(e)(10) is a fair hearing provision which permits the freezing of benefits if a hearing

(footnote continued)

That any household which timely requests such a fair hearing after receiving individual notice of agency action . . . shall continue . . . to receive benefits" 7 U.S.C. § 2020(e)(10).

^{7/} The congressional intent to leave the details of a § 2020(e)(10) notice to the Secretary and each state is further evidenced by contrasting the general language of § 2020(e)(10) with the more specific requirements included in other sections of the Act. For example, the monthly reports required by certain households must contain "a description, in understandable terms in prominent and bold face lettering, of the appropriate civil and criminal provisions dealing with violations of this chapter including the prescribed penalties." 7 U.S.C. § 2015(c)(3). See also 7 U.S.C. § 2020(e)(2) (requirements for uniform application form); 7 U.S.C. § 2016(c) (requirements for coupon design).

has been timely requested. The statute prescribes no particular form or content for notices in individual fair hearing situations, and is concerned with matters quite remote from the dynamics of a mass change, as the Secretary's implementing regulations reflect.^{8/}

The Secretary interprets the notice and fair hearing provision of § 2020(e)(10) to apply only to administrative actions based upon a change in an individual's particular circumstances,

^{8/} Parker claims that Congress intended a detailed notice be issued so that a household can detect and bring to the agency's attention any underlying inaccuracies in the household's file which may contribute to an erroneous payment. Nothing in the legislative history articulates such a rationale. Instead, Congress has explicitly chosen to deal with inaccurate household data by instituting a periodic reporting requirement for certain households. See 7 U.S.C. § 2015(c). Congress' choice as to the best way to deal with the problem should not be displaced.

as the situation addressed in Goldberg v. Kelly. From the beginning, the Secretary has consistently interpreted the notice and hearing provision of § 2020(e)(10) not to apply to legislative changes nor to mandate particular wording, content, or format of notices. The implementation of the § 2020(e)(10) notice and fair hearing requirements is set out in the "notice of adverse action" regulations, 7 C.F.R. § 273.13, and fair hearing regulations, 7 C.F.R. § 273.15, which were first promulgated in 1971 following Goldberg v. Kelly. See 36 Fed. Reg. 20145 (October 16, 1971). Under the Secretary's regulations, a state must mail an "adequate" notice at least ten days prior to the proposed administrative action to terminate or reduce a particular household's benefits. By contrast,

when the state implements the type of legislative change which gave rise to this lawsuit, it is specifically exempted from this requirement for notice of adverse action. 7 C.F.R. § 273.13(b)(1). The Secretary's regulations do not prescribe the format and content of either an adverse action or mass change notice.^{9/}

^{9/} At the time this action arose, the Secretary mandated the content of the adverse action notice and required prior approval of the form of the notice. The Secretary has eliminated his approval of the notice of adverse action as well as specific requirements for its content and format in order to conform with § 166 of the 1982 Food Stamp Act amendments, Pub. L. No. 97-253, 96 Stat. 763, 779, which provides for increased state agency flexibility for all forms and notices except the Application Form. 48 Fed. Reg. 6313, 6314 (February 11, 1983). Thus, at the same time the Congress determined that there should be less federal specification of the form and content of food stamp notices, the courts below were imposing specifications which went beyond those requirements which Congress deemed appropriate.

The Secretary's contemporaneous and consistent construction of the Act's notice and fair hearing provision is entitled to deference by this Court in view of his broad authority to administer a complex program such as the Food Stamp Program. See Aluminum Co. of America v. Central Lincoln Peoples' Utility District, 104 S. Ct. 2472, 2479-80 (1984); see also Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981). Further, Congress has recognized the Secretary's regulatory distinction between notices of adverse action and mass change notices and has permitted that distinction to stand.^{10/}

^{10/} The House Report on the 1977 amendments that added the notice language upon which Parker relies states: "The Committee bill would retain the fair hearings provision of the law intact and would encourage the Department to enforce its excellent regulations and instructions on the subject. . . . The Department

(footnote continued)

Accordingly, there is no support whatsoever in the language, history, or purpose of the Food Stamp Act for the conclusion that the December notice was statutorily defective simply because it did not contain particularized factual data for each household and because it contained words "deemed unfamiliar" to some households. Just as the Due Process Clause does not mandate the form and con-

(footnote continued)

should also be certain that, although its regulations do not require individual notice of adverse action when mass changes in program benefits are proposed, they should require the states to send precisely such notices well in advance when the massive changes mandated by this bill are to be implemented. . . . All states should be overseen to be certain that their individual notices in non-mass change adverse action contexts recite the household's fair hearing request rights and the availability of free legal representation, if any. . . ." H.R. Rep. 95-464, 95th Cong., 1st Sess. 289 reprinted in 1977 U.S. Code Cong. & Ad. News 2224-25.

tent of a notice neither does the Food Stamp Act.

C. While The Court May Properly Consider Whatever Statutory Issue Exists In This Case, Review Of The Constitutional Question Is Unavoidable.

The Commissioner's petition seeks reversal of the Court of Appeals judgment declaring the December notice invalid. The challenged judgment is based principally on constitutional, not statutory, grounds. As discussed above, the statutory determination is merely an appendage to the more comprehensive constitutional analysis and is dependent upon and subsumed within the issue presented by the Commissioner's petition. Therefore, the question of the validity of the statutory holding is fairly included within the constitutional question presented and

thus properly before this Court. See Supreme Court Rule 15.1(a) ("The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein."). For example, in Arkansas Electric Co-op. Corp. v. Arkansas Public Commission, 103 S. Ct. 1905, 1911-12 n.6 (1983), the jurisdictional statement raised only a Commerce Clause issue; nevertheless, as a separate ground for reversal, the Court considered the statutory pre-emption issue which it determined to be fairly included within the constitutional question presented because of the close relationship between the legislative and judicial enforcement of the Commerce Clause. In this case, there is a similar congruence of judicial and legislative enforcement of the Due Process Clause, as the notice provision

relied upon found its genesis in Goldberg v. Kelly.^{11/}

Moreover, the remedy questions raised in Parker's petition place the statutory issue squarely before the Court as well.^{12/} Parker states, for example, "[i]n order to evaluate the propriety of the remedy afforded, it is necessary to

^{11/} See also United States v. Arnold, Schwinn & Co., 388 U.S. 365, 371-72 n.4 (1967); Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 94 n.9 (1982); Vance v. Terrazas, 444 U.S. 252, 258-59 n.5 (1980).

^{12/} Parker presents the following questions in his petition: "2. Did the Court of Appeals for the First Circuit violate the command of the Food Stamp Act by refusing to permit the restoration of benefits withheld without the prior, adequate notice required by the Act?"; "3. By reversing both the award of prospective injunctive relief and the restoration of wrongfully withheld benefits, did the Court of Appeals for the First Circuit render meaningless the plaintiffs' statutory right to prior, adequate notice?"

examine the context and purpose of the statutory provision that has been violated." Brief at 2. He asks the Court to rule that the award of retroactive benefits was proper because the notice and hearing provision, 7 U.S.C. § 2020(e)(10), provides households with a substantive entitlement to food stamps until a recipient-specific notice is received. Brief at 38-39. Thus, the question of what § 2020(e)(10) requires is also fairly included within the questions raised by Parker's petition. Likewise, since the Court of Appeals premised whatever remedy it was willing to order on the existence of constitutional violations, the propriety of the remedy implicates the nature - constitutional or statutory - of the violation. Milliken

v. Bradley, 433 U.S. 267, 280-81 (1977).^{13/}

Review of the statutory determination alone, however, will not dispose of this case. The Court of Appeals held that the Due Process Clause of the Fourteenth Amendment mandates that notices announcing across-the-board legislative changes in the Food Stamp Program must contain

^{13/} Even if the questions raised by both petitions cannot be said to fairly comprise the statutory issue, the Court is not without the power to review the lower court's statutory determination if deemed to be controlling. Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978); Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. at 94 n.9. The Court has exercised this power where, as here, the court below has considered the issue and the parties have fully briefed it. United States v. Arnold, Schwinn & Co., 388 U.S. at 371 n.4; Blonder-Tongue v. University Foundation, 402 U.S. 313, 320-21 n.6 (1971). Cf. Escambia County, Florida v. McMillan, 104 S. Ct. 1577, 1579 (1984) (per curiam) (where Court of Appeals did not decide statutory issue and the parties did not brief it before the Supreme Court, case was remanded).

the precise effect of the legislative change for each household and enough factual data from the household's case file to enable it to determine from the face of the notice whether the agency has made an error in computing its benefits. PA. 21, 24, 100, 102-03.

Parker invokes the Court's preference for avoiding constitutional questions in cases which can be decided on statutory grounds. The Court of Appeals is familiar with that preference and has invoked it in its own adjudications.^{14/} The Court must have therefore determined that the appeal below could not be decided without reaching the due process question. See Hutchinson v. Proxmire, 443

^{14/} See, e.g., Catrone v. Massachusetts State Racing Commission, 535 F.2d 669, 671 (1st Cir. 1976).

U.S. 111, 123 (1979).^{15/}

Further, this case presents issues which are of continuing urgency not only in Massachusetts but throughout the Nation. The Court of Appeals decision has immediate, significant impact on the administration of many grant programs. Rather than simply judging the December notice to be inadequate, the courts below announced constitutional requirements for all mass change notices issued under the Food Stamp Program.^{16/} Since the

^{15/} If the Court were not to reach the constitutional question, as Parker argues, then it can not reach the remedy issues. The Court of Appeals determined the appropriate remedy based upon the constitutional finding of an inadequate notice. See PA. 34-37.

^{16/} The Court of Appeals is not the only federal court to decide a notice case such as this on constitutional grounds. See, e.g., Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied 420 U.S. 1008 (1975); Willis v. Lascaris, 499 F. Supp. 749 (N.D. N.Y. 1980).

Food Stamp Program is a federal program and mass changes can and do occur regularly review by the Court is necessary.^{17/} For the reasons set forth in the Commissioner's earlier brief, the Court of Appeals decision should be reversed.

II. THE COURT OF APPEALS PROPERLY RULED THAT THE FOOD STAMP ACT ONLY AUTHORIZES AN AWARD OF RETROACTIVE BENEFITS WHERE THERE HAS BEEN AN ERRONEOUS ALLOTMENT.

Only if this Court disagrees with the Commissioner and the Secretary and determines that the December notice did not adequately inform households of the legislative change in the earned income deduction, is it necessary to reach the

^{17/} Legislative and regulatory changes in the Food Stamp Program as well as changes or adjustments (such as a cost-of-living adjustment) in other public benefit programs frequently require changes in food stamp benefits.

remedy issues raised by Parker.

Although the District Court did not find that any household failed to receive all the food stamp benefits to which it was entitled, it nonetheless awarded retroactive benefits to the entire class of 16,000 households. The Court of Appeals reversed this award of unwarranted, sweeping relief and instead ordered the Department to review each household's file and provide retroactive benefits, but only to those households that may have received an incorrect benefit amount.^{18/} The Commissioner believes

^{18/} Since the legislative change simply required a computer recalculation of each household's benefits using financial data already on file, the risk of an error in benefits, attributable to the implementation of this reduction, was minimal. The Court of Appeals acknowledged "the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated." PA. 33.

that the Court of Appeals was correct because the remedy imposed by the District Court was inconsistent with the Food Stamp Act and the constitutional requirement that a remedy must be confined to the wrong.^{19/}

Two sections of the Food Stamp Act allow for restoration of benefits. Section 2020(e)(11) provides that upon receipt of a request from a household, benefits which have been "wrongfully denied or terminated" shall be restored.

^{19/} Parker relies upon the statute to support his remedy arguments; yet, it is the constitutional finding of an inadequate notice upon which the remedy decision is based. See PA. 34-37. The Court of Appeals decision properly recognizes that a remedy must be related to "the condition alleged to offend the constitution," and should be "designed as nearly as possible to restore the victims . . . to the position they would have occupied in the absence of such conduct." Milliken v. Bradley, 433 U.S. 267, 280 (1977) (citations and quotations omitted); Dayton Board of Education v. Brinkman, 433 U.S. 406, 417 (1977).

Section 2023(b), which was added in 1981,^{20/} states that "[i]n any judicial action arising under this chapter, any food stamp allotments found to have been wrongfully withheld shall be restored"

It is apparently Parker's view that if a state agency does not issue an adequate notice, then it automatically follows that benefits have been "wrongfully denied" or "wrongfully withheld" and must be restored regardless whether the household in fact received the correct amount of benefits. Parker also argues that § 2020(e)(10), which allows benefits to be frozen until an appeal is heard, provides a substantive entitlement to benefit until an adequate notice is issued.

^{20/} Pub. L. No. 97-98, § 1320, 95 Stat. 1282, 1286.

The Commissioner disagrees. A household's substantive interest is in having its food stamp benefits properly calculated and issued, not in receiving a particular form of notice or procedure.^{21/} Parker's argument also ignores the fact that benefits are frozen only until the appeal is decided. If the household does not prevail at the appeal it is required to return the overpayments it received while the appeal was pending. See 7 C.F.R. § 273.15(k).

^{21/} See, e.g., Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983); Codd v. Velger, 429 U.S. 624, 627 (1977) (per curiam); see also Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974) (due process protects substantial rights, it does not guarantee a particular form of procedure). Cf. Chapman v. California, 386 U.S. 18, 22 (1967) ("there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless").

Parker's expansive interpretation of the Act's restoration provisions cannot be squared with the congressional intent and purpose behind these provisions and the Act as a whole.^{22/} The proper reading of the restoration provision allows for restoration of benefits only to those households that experienced a denial or withholding of benefits which, under the rules governing eligibility for and calculation of benefits, they should have received. In Parker's view, even if Congress determines by statute that all food stamp households should receive 5% less in benefits, a particular household whose benefits are correctly reduced by 5% is entitled to restoration of the benefits if the notice of the re-

^{22/} The terms "wrongfully denied" or "wrongfully withheld" are neither defined nor explained in the Act.

duction contains some procedural flaw. But there is no logic which supports the view that Congress intended that its control over food stamp expenditures could be thwarted by state officials issuing defective notices of mass changes, particularly in light of the congressional and secretarial determinations that the form and content of mass change notices be left to the states. See Pub. L. No. 97-253, § 166; see also 7 C.F.R. § 273.12(e).^{23/}

^{23/} Parker also erroneously views the restoration provision as a private enforcement mechanism for all the procedural requirements of the program. There is absolutely no support for this claim. The notice and fair hearing provision is part of the overall state plan requirements. Congress has given the Secretary, not private litigants, express authority to ensure compliance with these provisions as well as the state plan as a whole by withholding funds from the state and by an injunction. 7 U.S.C. § 2020(g). Of course, those households

(footnote continued)

The legislative history of the restoration of benefits provision also supports the common sense interpretation that only substantive entitlements to food stamps were protected. The restoration of benefits provision was added by the Food Stamp Act of 1977, Pub. L. No. 95-113, § 1301, 91 Stat. 958, 972 (1977).^{24/} The House Report, consistent with the Commissioner's and the Secretary's interpretation, refers only to errors in determining eligibility for

(footnote continued)

that have suffered an actual injury, that is, ultimately received less benefits than they were entitled to receive under the program rules, can make a claim under § 2020(e)(11). No such plaintiff is now before the Court. See PA. 53-54, 56; JA. 132-33, 139, 151; P. Exh. 12, 13, C.A. App. II, 25, 28.

^{24/} Prior to the enactment of this provision, the Secretary's regulations allowed for restoration of lost benefits. See 7 C.F.R. § 271.1 (1976); 41 Fed. Reg. 11464 (March 19, 1976).

or amounts of benefits: "Thus, if a household lost benefits because it was found to be ineligible when it was eligible or because its allotment was not as high as it should have been such benefits would be recouped in the form of allotment add-ons."^{25/} No mention is made of "wrongful denials" resulting from inadequate notice where the underlying substantive decision is correct. Instead, the House Report explained that the Secretary's previously promulgated restoration of benefits regulation was a direct result of a 1972 federal court decision, Bermudez v. United States Department of Agriculture,^{26/} which required retro-

^{25/} H.R. Rep. No. 95-464, 95th Cong., 1st Sess. 284-85, reprinted in 1977 U.S. Code Cong. & Ad. News 2220.

^{26/} 348 F. Supp. 1279 (D.D.C. 1972), aff'd, 490 F.2d 718 (D.C. Cir. 1973),

(footnote continued)

active benefits for those households where benefits had been "wrongfully withheld." The nature of the wrongful withholding in Bermudez was the erroneous withholding of benefits to which the household was otherwise entitled. For example, one eligible recipient because of an administrative error did not receive any benefits for ten months; another recipient, because of agency error had her benefits terminated.

Unlike the circumstances addressed by Bermudez and the resulting regulations, there has been no showing in this case that any household received an incorrect allotment of food stamps. If

(footnote continued)

cert. denied, 414 U.S. 1104 (1974). See H.R. Rep. 95-464, 95th Cong., 1st Sess. 283 reprinted in 1977 U.S. Code Cong. & Ad. News 2219. See also 39 Fed. Reg. 35177, 35178 (September 30, 1974).

there are any such households, the Court of Appeals decision provides for them. To provide all 16,000 households, however, with retroactive benefits is not to restore statutorily conferred benefits that have been wrongfully denied, but to provide a windfall not contemplated by the Food Stamp Act. It would do so at the federal taxpayers' expense.^{27/}

^{27/} Though the Court need not go so far in this case to dispose of Parker's contentions, the Commissioner notes that decisions of this and other courts would support the proposition that even where a household has actually been denied the correct benefit level, an award of retroactive benefits more than two years after the wrongful denial is not remedial. Edelman v. Jordan, 415 U.S. 651, 666 n.11 (1974) (quoting Rothstein v. Wyman, 467 F.2d 226, 235 (2nd Cir. 1972)) ("As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear.").

(footnote continued)

The award of retroactive benefits to households that had received the correct allotment either initially or after an appeal would indeed increase the total program costs, a result entirely inconsistent with congressional intent.^{28/}

The containment of costs has been the primary purpose of the various amendments to the Food Stamp Act of 1964. The 1977 amendments, for example, involved tight-

(footnote continued)

Two circuits have followed this reasoning to bar retroactive food stamp benefits even where households received a benefit amount less than that to which they were entitled. See Klaips v. Bergland, 715 F.2d 477, 484-485 (10th Cir. 1983); Colbeth v. Wilson, 554 F. Supp. 539, 546 (D. Vt. 1982), aff'd, sub nom. 707 F.2d 57 (2nd Cir. 1983).

^{28/} In requiring the benefits to be restored, the court in Bermudez noted that the retroactive benefits "do not add to the budgeted expense of operating the program. It is merely expense which through error is delayed in its final payment." Bermudez, 490 F.2d at 723.

ening program administration, eliminating the non-needy from the program, and holding program costs close to then-current program levels.^{29/}

Lowering the earned income deduction by 2%, which prompted the mass change notice in this case, was part of the general effort to reduce the growth of Food Stamp Program expenditures "by restricting eligibility for the Program and reducing benefits for certain households which remain eligible." 46 Fed. Reg. 44712 (September 4, 1981). Yet, the District Court's order did what Congress specifically required states not to do; that

^{29/} See H.R. Rep. No. 95-464, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. Code Cong. & Ad. News 1978. The 1981 amendments were part of the 1981 Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 357 (1981), the sole purpose of which was to reduce federal spending. See S. Rep. No. 97-139, 97th Cong., 1st Sess. 2-3, reprinted in 1981 U.S. Code Cong. & Ad. News 397-98.

is, it required the Department to compute eligible recipients' benefits based upon a 20% rather than 18% earned income deduction. Thus, the order which Parker seeks to reinstate not only counters the unmistakable intent of Congress, but also ignores the admonition of this Court that it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." Schweiker v. Hansen, 450 U.S. 785, 788 (1981) (per curiam), (quoting Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947)).

The Court of Appeals decision, on the other hand, is entirely consistent with the purpose of the Food Stamp Act. Under its formulation, retroactive benefits are extended only to those households that received an erroneous allotment. The Court of Appeals reversed the

award for only those households whose benefits were correctly computed in accordance with the dictates of Congress using the 18%, rather than the 20%, earned income deduction. Neither the Food Stamp Act, decisions of this Court, nor considerations of equity require more than this.

III. THE COURT OF APPEALS CORRECTLY SET ASIDE THE UNNECESSARY AND OVERLY INTRUSIVE MANDATORY INJUNCTION.

In addition to the award of retroactive benefits, the District Court issued a two-part mandatory permanent injunction. First, the District Court prescribed the content of all future food stamp notices;^{30/} second, it ordered

^{30/} Although a mass change notice was challenged in this case, the District Court injunction covered all notices issued under the Food Stamp Program.

the Commissioner to draft regulations, subject to the court's approval, with legibility and comprehensibility standards for future notices. PA. 102-04.^{31/}

The Court of Appeals correctly reversed this injunction because it "placed an improper and unnecessary burden upon the Department. . . ." PA. 38. Although the District Court has discretion to fashion an appropriate remedy, the exer-

^{31/} The District Court heard evidence offered by plaintiffs concerning type-face, size of type, capitalization, the frequency of multisyllabic words, the reading level of the average food stamp recipient, and similar matters. On this evidence the District Court concluded that the Due Process Clause requires mass change notices to be printed no smaller than eight-point type, with a mixture of upper and lower case letters, and written for a person with a fifth-to-sixth grade reading capacity. Presumably, the District Court intended that the state regulations it ordered contain a minimum reading level and specific typographical requirements for future food stamp notices.

cise of that discretion is not unguided by meaningful standards or shielded from thorough appellate review. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). The scope of any such relief must be consistent with the intent of the Food Stamp Act and must be appropriate to the circumstances of the case. The District Court injunction was not.

The Food Stamp Program is funded by the federal government, but is largely administered by the states. 7 U.S.C. § 2020. The states are required to administer the program in a manner consistent with federal law and regulations promulgated by the Secretary, 7 U.S.C. §§ 2013(c), 2025(b)(1), and certain aspects of the administration of the program are explicated in great detail by federal regulations. E.g., 7 C.F.R. § 273.9(a) (eligibility criteria and

benefit levels which states must adhere to); 7 U.S.C. § 2014(c) and 7 C.F.R. § 274.9(d) (explicit prescription of method for computing household income for eligibility purposes).

In contrast to these explicit federal requirements, the federal statutory and regulatory scheme governing the issuance of mass change notices is silent as to the form and content of such notices. Thus, while the states must certainly draft and issue notices which meet the minimum requirements of due process, the precise contours of the states' adherence to constitutional principles is left to the states. Rosado v. Wyman, 397 U.S. 397, 408-409 (1970) (the details of implementing federal law in the area of public assistance, when not explicitly laid out by federal statute or regulation, are left to the states). Cf.

Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 208 (1982) (in analogous federal scheme, "questions of methodology are for resolution by the states.").^{32/}

The District Court's intrusion on the Secretary's and the state's implementation prerogatives is inconsistent with congressional intent to leave the administration of the program and the imposition of specific federal notice requirements to the Secretary and each participating state. The development of notices that comply with complex program rules and are useful to both the agency and

^{32/} Recent amendments to the Food Stamp Act allowing states even more flexibility to draft and issue forms and notices clearly show Congress' intent to leave the form and content of notices to the states. Pub. L. No. 97-253, § 166, 96 Stat. 763, 779. See S. Rep. No. 97-504, 97th Cong., 2nd Sess. 92-93 reprinted in 1982 U.S. Code Cong. & Ad. News 1730-33.

household is a continuing process which is better suited to the legislative and administrative arena rather than the federal courts. Cf. Heckler v. Day, 104 S. Ct. 2249, 2256 (1984) ("In light of the unmistakable intention of Congress, it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims.")

The Court of Appeals decision also properly reflects the well-accepted principle that an injunction should not be granted except in the most extraordinary circumstances. See Rizzo v. Goode, 423 U.S. 362, 379 (1976). It saw no reason to depart from this Court's teaching that, in cases involving a government defendant, a declaration is normally sufficient to ensure future conduct. Doran

v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("[A] district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary."). Finally, the Court of Appeals found insufficient proof that the state defendant would continue to engage in the proscribed conduct, and so determined that an injunction was unwarranted. Poe v. Gerstein, 417 U.S. 281 (1974) (per curiam); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 584 (1971).

The District Court's declaration that the challenged food stamp notice did not meet due process requirements was sufficient. The permanent injunction as to the content, legibility, and comprehensibility of all future notices of reduc-

tion would threaten the Commissioner with contempt sanctions whenever congressional action modifying the Food Stamp Program caused him to communicate with food stamp recipients and the adequacy of any future food stamp notice was inevitably drawn into question. The circumstances of this case fall far short of what is necessary to justify such a drastic remedy.

It was undisputed at trial that the challenged notice of reduction, with respect to its type-size and wording, was not the Department's typical food stamp mass change notice.^{33/} There was no showing that the Department planned to issue other notices with similiar type

^{33/} The notice was in two parts; the first part explained the statutory change in the earned income deduction and appears in its entirety in the Court of Appeals decision, PA. 4; the second part provided the explanation of the temporary restraining order. Id.

and wording. Indeed, such a showing would have been a virtual impossibility; part of the difficulty with the challenged notice stemmed from its attempt to provide a thorough explanation of the effect of the District Court's temporary restraining order on the households' previous benefit reductions and appeal rights. This attempt was, in turn, thought necessary because the District Court had enjoined the notices originally issued the previous month and ordered restoration of benefits. In the event the court's declaration of rights survives this Court's review, such a set of circumstances is hardly likely to recur.

Furthermore, with respect to the lack of recipient-specific data, the District Court found that the Department currently includes in all mass change notices under the Food Stamp Program each household's

old and new benefit amount. PA. 49.^{34/}
The Department's voluntary inclusion of certain recipient-specific data in current mass change food stamp notices is a relevant factor as to whether it was necessary for the District Court to order such extraordinary relief. E.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982).^{35/}

^{34/} The Court of Appeals also acknowledged "that the state supplied adequate notice in a very similiar situation involving statutory reductions in the . . . AFDC . . . program. LeBeau v. Spirito, 703 F.2d 639 (1st Cir. 1983)." PA. 38.

^{35/} Parker attaches to his brief a food stamp notice of reduction due to a social security cost-of-living increase issued this past March which is, of course, not part of the record in this case. Appendix C. He claims that the Commissioner's failure to include underlying factual data underscores the need to place the Commissioner's issuance of notices under court supervision to prevent erroneous calculation or termination of benefits. Parker has refused to provide the Commis-

(footnote continued)

Parker believes that the Court of Appeals acted improperly because it relied to some extent upon the Department's good faith and such reliance was at odds with this Court's recent decision in Pennhurst v. Halderman, 104 S. Ct. 900 (1984). Pennhurst held that a federal court lacks the power to award injunctive relief against state officials on the basis of state law. The plaintiffs rely not on this holding but on a footnote stating that a finding of good faith, and therefore immunity from damages,

(footnote continued)

sioner with sufficient information, even under confidentiality arrangements, to determine whether the individual who received that notice was in fact erroneously deprived of benefits. Even so, Parker ignores the fact that the format and language of the notice is quite different from the challenged notice and, even under his view of notices, is vastly improved.

"does not affect whether an injunction might be issued . . . by a court possessed of jurisdiction." Id. at 912 n.17 (emphasis added). The Court of Appeals decision is entirely consistent with the accepted principle articulated in that footnote. The District Court injunction was not set aside simply because the Department demonstrated a lack of bad faith. Rather, the Court of Appeals considered the Department's lack of bad faith as one of the several factors outlined above in order to assess whether, under the facts and circumstances of this case, a prospective mandatory injunction was necessary.

The Court of Appeals properly exercised its appellate role in reversing the extraordinary permanent injunction entered by the District Court. The injunction was inconsistent with the con-

gressional intent to allow the Secretary and the states to fill in the details of the complex Food Stamp Program. It was burdensome and simply unnecessary in view of the declaration that was issued, and in view of the unique circumstances which gave rise to the December notice. Finally, the order that the state promulgate regulations, subject to court approval, was an unwarranted and unnecessary intrusion into the state's and the Secretary's administration of the Food Stamp Program.

CONCLUSION

For the foregoing reasons and those in the Commissioner's previously filed brief in support of his petition, the Commissioner of Public Welfare requests that the Court of Appeals decision be reversed. Should this Court affirm the

Court of Appeals on the merits, however, and reach the remedy issues raised by Parker's petition, the Court of Appeals decision as to the appropriate remedy should be affirmed.

Respectfully submitted,

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES M. ATKINS, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
PETITIONER

v.

GILL PARKER, ET AL.

GILL PARKER, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF IN NO. 83-1660 AND BRIEF IN
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QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that individualized advance notice be given to each affected food stamp recipient prior to the implementation of statutory benefit level adjustments, when the statutory change can be implemented without any new or additional factual findings as to individual recipients.

2. Whether, assuming that the Due Process Clause requires some type of individualized advance notice, the notices issued by the Massachusetts Department of Public Welfare in the instant case, coupled with the other procedures for reducing the risk of error, were constitutionally sufficient.

3. Whether the notices in this case were adequate under the Food Stamp Act and the pertinent federal regulations.

4. Whether, assuming that the notices in this case were in violation of the Constitution or applicable statutory or regulatory provisions, the court of appeals correctly reversed the district court's remedial order, which would have required the retroactive payment of food stamp benefits to the plaintiff class in excess of the level authorized by Congress and would have required the Commonwealth to promulgate notice regulations under district court supervision.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1660

CHARLES M. ATKINS, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
PETITIONER

v.

GILL PARKER, ET AL.

No. 83-6381

GILL PARKER, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT*

**REPLY BRIEF IN NO. 83-1660 AND BRIEF IN
NO. 83-6381 FOR THE FEDERAL RESPONDENT**

SUMMARY OF ARGUMENT

This case involves the implementation of a 1981 statutory reduction in food stamp benefits. Section 106 of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 360, reduced the amount of earned income deducted (or "disregarded") in the calculation of a household's food stamp benefits from 20%

to 18%. Plaintiff-respondents filed suit in federal court to challenge the means by which the Commonwealth of Massachusetts implemented this statutory change. The district court held that the notice provided by the Commonwealth was insufficient, and ordered the Commonwealth to restore the benefit reduction retroactively to all members of the plaintiff class. The court of appeals, while agreeing with the district court that the notices were insufficient, reversed the remedial order. Plaintiff-respondents petitioned for review of the reversal of the remedial order (No. 83-6381) and the Commonwealth cross-petitioned for review of the holding that its notices were insufficient (No. 83-1660). This Court granted both petitions.

In our opening brief, we demonstrated that the notices sent by the Commonwealth of Massachusetts did not violate the Due Process Clause. Since the reduction in food stamp benefits was a result of a statutory change rather than a factual determination by the state agency, it need not have been preceded by due process protections of notice and a hearing. And even if some notice was constitutionally required, the Commonwealth's notice explained, in terms "generally familiar" to food stamp recipients (as the district court found (Pet. App. A96)), the nature of the change in benefits and the availability of a fair hearing in the event of error. Additional procedures required by statute and regulation guarantee further information to recipients and reduce the risk of computational error. Due process requires no more. Since the lower courts' rulings on plaintiff-respondents' claims of statutory and regulatory deficiencies were wholly dependent on the prior constitutional holding, and no independent inconsistencies between the notices and the Food Stamp Act or the Department's regulatory notice requirements had been identified in the litigation, the notices were fully sufficient under law.

Plaintiff-respondents' brief takes issue with our submission on the sufficiency of the notice, and also intro-

duces the remedial issue. We shall therefore first reply to plaintiff-respondents' arguments on the sufficiency of notice, and then turn to the remedial question.

I. Plaintiff-respondents first urge this Court not to address the question of the sufficiency of notice, but to dismiss the Commonwealth's cross-petition as improvidently granted. Since this is but a reiteration of the arguments they presented unsuccessfully in opposition to the Commonwealth's petition, and is in any event of little merit, this suggestion should be rejected.

On the merits, plaintiff-respondents place primary emphasis on independent statutory grounds for affirmance, not articulated by the lower courts. They contend that the second clause of 7 U.S.C. 2020(e)(10), which requires states to maintain prior levels of benefits during the pendency of a fair hearing on an adverse action, indicates that Congress intended the states to provide advance notices to food stamp recipients, even in cases where benefits are reduced by Act of Congress, containing information about how the statutory change will affect each individual household. However desirable such recipient-specific notices may be as a matter of practice, however, neither the statute nor the Department's regulations require them.

The Department's regulations clearly distinguish between "adverse actions," which are fact-specific reductions or terminations applying to a particular food stamp recipient, and "mass changes," which are changes in the law that apply on an across-the-board basis to all or a large segment of the recipient population. Adverse actions must be accompanied by recipient-specific notices; mass changes need only be preceded by a general notice informing all affected recipients of the nature of the change. Section 2020(e)(10), far from invalidating this regulatory scheme, incorporates it. The section does not itself require any notice whatsoever. However, in addressing the effect of notices on the right to continued benefits during fair hearings, the section explicitly

adopts the terminology of the Department's notice regulations. The legislative history shows that Congress was aware of, and understood, the Department's distinction between adverse actions and mass changes. Thus, when Congress used the same terminology in the second clause of Section 2020(e)(10), it was evidently intending the same meaning to apply.

Plaintiff-respondents also defend the lower courts' finding of a due process violation. However, they wholly fail to explain how the advance notice and hearing procedures required when a welfare recipient claims that he will receive fewer benefits than he is entitled to under law (see *Goldberg v. Kelly*, 397 U.S. 254 (1970)) can be stretched to require advance notice and a hearing before a change in the law can be put into effect. And even assuming some notice is required, plaintiff-respondents substantially overestimate the risk of error in the Commonwealth's procedures and the value of more elaborate notices to food stamp recipients. The result is to create a highly disruptive constitutional rule with no perceptible limiting principle.

II. On the remedial question, plaintiff-respondents contend, in the alternative, that they were entitled under 7 U.S.C. 2023(b) to retroactive benefits at the prior statutory level, or that the district court's order granting them such benefits was within the court's equitable discretion. Neither theory has merit.

Section 2023(b) itself is a limitation on the courts' power to grant retroactive benefits—even to recipients who were entitled to them under law—for a period exceeding one year before discovery of the error. The section is parallel to 7 U.S.C. 2020(e)(11), which requires states to restore wrongfully denied benefits for a period of up to one year. Both provisions originated in a prior regulatory requirement for restoration of lost benefits. The language of the prior provisions and the legislative history accompanying the congressional amendments make clear that the only errors for which restoration is

available are *substantive* errors in food stamp allotments. There is no right to receive benefits at a level exceeding the statutory level because of procedural errors that did not result in an incorrect allotment.

It follows that the district court's order was not within the court's equitable discretion. A court has no discretion to disregard other law, or to set its own level of welfare benefits as a result of procedural errors. This Court has plainly rejected the notion that a plaintiff is entitled to retroactive benefits for a due process violation where he cannot show that there was a substantive error in his case. *Carey v. Piphus*, 435 U.S. 247 (1978); *Codd v. Velger*, 429 U.S. 624 (1977).

Moreover, it would be a violation of sovereign immunity to require the Commonwealth or the federal government to pay retroactive benefits at a level exceeding that established by law. The court of appeals was correct in reversing this order.

The remaining aspects of the district court's order, requiring the Commonwealth to develop new regulations under district court supervision, were also correctly reversed by the court of appeals. Such a remedy is a serious intrusion into the Commonwealth's authority, delegated to it by Congress. The district court made no findings that would justify such an extreme remedy. As the court of appeals observed, both the good faith of the Commonwealth and the lack of any indication that injunctive relief would be required to ensure lawful conduct in the future make the district court's injunctive order inappropriate.

ARGUMENT

I. THE MASSACHUSETTS NOTICE SATISFIED ALL APPLICABLE STATUTORY, REGULATORY, AND CONSTITUTIONAL REQUIREMENTS

A. This Court Is Not Precluded From Reaching The Issues Raised By The Commonwealth's Cross-Petition

On June 18, 1984, this Court granted the Commonwealth's cross-petition for a writ of certiorari in No. 83-1660, which raised two questions: the validity of the court of appeals' holding that the Commonwealth's notice to food stamp recipients violated the recipients' due process rights, and the correctness of the court of appeals' standard of review of the findings of the district court.

Plaintiff-respondents urge this Court (Br. 18-22) to dismiss the cross-petition in No. 83-1660 as improvidently granted, on the basis that the Commonwealth's notice was in violation of 7 U.S.C. 2020(e)(10) and that it is therefore unnecessary for this Court to review the lower courts' determination that the notice was in violation of the Due Process Clause. This merely reiterates the argument plaintiff-respondents unsuccessfully made in their brief in opposition to the cross-petition (at 1-3, 5). No intervening circumstances or additional information have come to light that would warrant a different disposition now. See *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 559 (1957) (Harlan, J., concurring and dissenting) (dismissal as improvidently granted not warranted "in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted"); see also *Burrell v. McCray*, 426 U.S. 471, 474-475 (1976) (Brennan, J., dissenting); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

In any event, plaintiff-respondents' position is without merit. Although the Commonwealth did not explicitly address the statutory holding of the courts below in its questions presented, that question is fairly subsumed.

See Sup. Ct. R. 21.1(a). As noted in our opening brief (at 18 n.18), the court of appeals expressly predicated its statutory holding on its prior conclusion that the Commonwealth's notice violated the Due Process Clause. The court stated the basis for its statutory holding as follows (Pet. App. A31-A32) (emphasis added): "We doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement and thus we affirm the district court's conclusion that the December notice failed to satisfy the notice requirements of 7 U.S.C. 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii)."¹ This makes clear that the court's statutory holding follows from, and is dependent on, its prior constitutional holding. The court of appeals was surely aware of the fundamental principle that the courts should not adjudicate constitutional issues where there are alternative bases for decision. That the court found it necessary to address the constitutional question at great length corroborates this interpretation of the opinion.

Although we agree that plaintiff-respondents may raise independent statutory grounds for affirmance of the court's holding on the liability issue, such grounds cannot, under the circumstances, preclude the Commonwealth and the federal respondent from addressing the issue properly raised in the cross-petition, or from contesting plaintiff-respondents' independent statutory position.²

¹ The additional discussion of Section 2020(e)(10) to which plaintiff-respondents refer (Br. 19) was necessary to establish that the statute applies at all to mass changes (a conclusion with which we disagree); having found that it applies, the court based its holding that the statute was violated solely on its conclusion that the statute would, at a minimum, have to incorporate what the court of appeals believed to be the constitutional standard.

² Moreover, the Commonwealth, in its petition, challenged the standard of review applied by the court of appeals to the district court's factual findings. This question perforce applies to both the constitutional and the statutory holdings below.

Finally, it would be difficult for this Court adequately to address plaintiff-respondents' own remedial question in the absence of a holding on the constitutional question. Plaintiff-respondents contend that they are entitled, as a remedy for the alleged deficiencies in the Commonwealth's notice, to receive food stamp benefits in excess of those established by statute. Whether such a remedy would be appropriate in the event of a constitutional violation (and we think it would not), it seems clear that the payment of such benefits would be wholly inappropriate as a remedy for violations of a mere regulation or a previously-enacted statute. Cf. *United States v. Caceres*, 440 U.S. 741 (1979). The lower courts' remedial holdings were predicated expressly and exclusively on the finding of a constitutional violation (see Pet. App. A32, A38 (court of appeals); *id.* at A99-A104 (district court)). For this Court to address the remedial question raised in No. 83-6381 solely on the assumption of a statutory violation would place the remedial issue in an entirely different legal context from that in which it was decided below.

B. The Massachusetts Notice Conformed To All Regulatory And Statutory Requirements

While contending that the notice sent to Massachusetts food stamp recipients in December 1983 violated the notice provisions of the Food Stamp Act, 7 U.S.C. 2020 (e)(10) (Br. 22-30), plaintiff-respondents virtually ignore the regulations that govern the issuance of notices. These regulations make clear that the Commonwealth was not obligated to provide advance notice of how the statutory change in the earned income disregard would affect each recipient household, but was obligated solely to inform them of the nature of the change in general terms.

The Department's regulations implementing the statutory change in the earned income disregard instructed the states to provide notice to affected recipients in the

manner prescribed for mass changes. 46 Fed. Reg. 44722 (Sept. 4, 1981). Those regulations, in turn, provide (7 C.F.R. 273.12(e)(2)(ii)):

A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change.

Notices of adverse action, described at page 4 of our opening brief, must contain specific information on the action to be taken with respect to each recipient household.³ Such notices, however, are required only in the event of an "adverse action"—*i.e.*, a termination or reduction initiated by the state agency on the basis of the facts in a particular case (see 7 C.F.R. 273.13(a)(2) (1983))—a category of actions that expressly excludes "mass changes." 7 C.F.R. 273.13(b)(1). Mass changes, as the regulation quoted above indicates, need not provide recipient-specific information; the only requirement is that the states "shall send individual notices to households to inform them of the change."⁴ As the court of

³ Even a notice of adverse action need not necessarily contain all of the information plaintiff-respondents seek. 7 C.F.R. 273.13(a)(2) (1983). The notice must contain a description of the "proposed action," but need not necessarily contain the former benefit level, the new benefit level, and other information "[s]ufficient * * * to allow the recipient to determine whether an error has been made." Cf. Pet. App. A103-A104. This Court need not decide what information is required under the adverse action regulations, since, as the court of appeals held (Pet. App. A28-A29), those regulations do not apply to a mass change, such as that involved in this case.

⁴ Plaintiff-respondents contend (Br. 28) that the term "individual notice," which is found in both the mass change regulation and in 7 U.S.C. 2020(e)(10), necessarily "contains the requirement for recipient-specific information." Indeed, they suggest (Br. 29) that, to be "individual notice," the notice must "include at least the amount of the proposed reduction to each household and the earned income figure upon which that reduction was premised." This argu-

appeals held, the change in the earned income disregard, at issue here, was subject to the "mass change" requirements, not the "adverse action" requirements (Pet. App. A28-A29).

Plaintiff-respondents disregard the distinction made in the regulations, and acknowledged by the court of appeals, between mass changes and adverse actions. They contend that the Food Stamp Act itself, in Section 2020 (e) (10), imposes a requirement of advance notice, with recipient-specific information for all cases in which benefits are reduced or terminated for whatever reason. The necessary implication of their position is that the Department's regulations—which predate the 1977 Act and have never been questioned by Congress—are inconsistent with the Act.⁵ We do not agree.

ment has no merit. "Individual" notice simply means notice provided to each individual household; the term indicates that general notice to the public through the Federal Register or the mass media is not sufficient. See pages 13-14, *infra*, discussing the 1978 change in the mass change notice regulation, which makes this clear.

⁵ An alternative explanation is that the mass change regulations impose the same recipient-specific notice requirements as are mandated for adverse actions. Presumably, this is what plaintiff-respondents mean when they state (Br. 28 n.16) that the Secretary "did seem to recognize that the notice [of mass changes] would require recipient-specific information." However, this would make nonsense of the explicit statements in 7 C.F.R. 273.12(e) (2) (ii) and 7 C.F.R. 273.13(b) (1) that the requirements for notice of adverse actions do *not* apply to mass changes. That the mass change regulation uses the term "individual notice" does not (as explained at note 4, *supra*) imply that the notice must include recipient-specific information. And the reference in the mass change regulation to the requirement of a fair hearing in cases where "the issue being appealed is that the food stamp eligibility or benefits were improperly computed" is no more than a recognition that, when such an error is discovered at any time, with or without notice, the recipient has a right to a fair hearing. Experience shows that notice of a mass change often induces recipients to investigate the correctness of their benefits, and sometimes to discover an underlying error. Indeed, this happened in the case of two of the four named plaintiffs in this action. See Fed. Resp. Br. 11-12 n.16.

Certainly, nothing in the language of the Food Stamp Act conflicts with the Department's regulations or imposes any notice requirements in excess of the regulatory requirements. The only statutory reference to notice is contained in the second clause of Section 2020(e) (10). This provision does not directly impose any notice requirements whatever; the statute merely *presupposes* the existence of notice (7 U.S.C. 2020(e) (10) (emphasis added)):

[A]ny household which timely requests such a fair hearing *after receiving individual notice of agency action* reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits on the basis authorized immediately *prior to the notice of adverse action* until such time as the fair hearing is completed * * *.

By its terms, Section 2020(e) (10) thus relates to the *consequence* of notice; the *requirement* of notice is imposed by preexisting regulation. The meaning of the statutory references to "individual notice of agency action" and "notice of adverse action" is therefore to be found in the regulatory notice requirements as they existed in 1977, when this portion of the statute was enacted (Pub. L. No. 95-113, § 1301, 91 Stat. 972), and is illumined by the history of those regulatory provisions.

When a notice requirement was first imposed by the Department in 1971, no distinction was made between adverse actions and mass changes. See 7 C.F.R. 271.1 (n) (1972). The same type of notice was required for each. In 1974, however, the Secretary amended the regulations to provide that "[i]ndividual notices of adverse action are not required when: (i) Mass changes in benefits are required for certain classes of recipients because of changes required by Federal or State law or Federal Regulation affecting the basis of issuance tables, income standards, or other eligibility criteria * * *" (7 C.F.R.

271.1(n)(2) (1975)). In the case of such mass changes, the states were required to "publicize the possibility of a change in benefits through the various news media or through a general notice mailed out with [food stamp allotment] cards and with notices placed in food stamp and welfare offices" (*id.* § 271.1(n)(3)). The explanation in the Federal Register stated that the change would "relieve State agencies of the obligation to identify and notify each household whose benefits are affected by the mass change and, at the same time, will provide households in a reasonable manner with an indication that some change in their program status should be expected." 39 Fed. Reg. 25996 (July 15, 1974).

This was the form of the notice regulations in 1977 when Congress incorporated the references to notice in the second clause of Section 2020(e)(10). When Congress used the term "notice of adverse action," it was referring directly to the individual "notice of adverse action" requirements in the Department's regulations. And when Congress used the term "individual notice of agency action," it could not have been referring to mass changes, since no *individual* notice of mass changes was required at that time. The legislative history confirms this. The House Report, H.R. Rep. 95-464, 95th Cong., 1st Sess. (1977), contained a summary of "[t]he current Federal rules" governing fair hearings (*id.* at 285), and stated that the Department's "regulations do not require individual notice of adverse action when mass changes in program benefits are proposed" (*id.* at 289). The committee accurately distinguished between mass changes and the requirement of "individual notices in non-mass change adverse action contexts" (*ibid.*). See Fed. Resp. Br. 22.⁶ This demonstrates that Congress understood the

⁶ Plaintiff-respondents disparage the significance of these statements of Congress's understanding on the basis that this House Report was written in 1976, before the second clause of what is now Section 2020(e)(10) was enacted (Br. 26). That, however, is of no significance: the statements were a description of the regulatory

distinction drawn by the Secretary between mass changes and adverse actions and incorporated that distinction by its use of the terms "individual notice" and "notice of adverse action" in Section 2020(e)(10).⁷

Plaintiff-respondents' contrary argument relies heavily (Br. 27) on the House and Senate conference reports on the Food Stamp Act of 1977. H.R. Rep. 95-599, 95th Cong., 1st Sess. 197 (1977); S. Rep. 95-418, 95th Cong., 1st Sess. 197 (1977). However, those reports do no more than summarize the effect of the second clause of Section 2020(e)(10). Indeed, the reports use the term "adverse action" in precisely the same sense in which it is used in the statute, the regulations, and the earlier House Report. Plaintiff-respondents' convoluted attempt to show that Congress did not understand the meaning of the terms it was using simply ignores the linguistic and regulatory context of the statute and the conference reports.⁸

Developments subsequent to the Food Stamp Act of 1977 cast further light on the mass change notice requirements. At the time of the 1977 Act, Congress ex-

notice requirements as they existed at that time, not a description of the legislation. In any event, the 1977 Act did not alter the scope of the prior regulatory notice requirements.

⁷ As plaintiff-respondents point out (Br. 26) the second clause of Section 2020(e)(10), which employs the "individual notice" and "adverse action" terminology, was added to the legislation during committee mark-up, without any suggestion that a different meaning was intended. Had Congress intended to invalidate the Department's regulations and to renounce the well-recognized distinction between mass changes and adverse actions, it surely would have included some explanation to that effect in the legislative history.

⁸ Plaintiff-respondents attempt to draw a distinction (Br. 27) between "notice of adverse action"—the term used in the regulations and the statute—and "notice of the adverse action," which is used in the conference reports. The context convincingly demonstrates, however, that Congress did not intend these formulations to convey a substantive difference in meaning.

pressed its desire through a legislative report that the Department provide individual notice—not just announcements in news media and food stamp offices—to food stamp recipients, to inform them of the mass changes enacted by the 1977 Act. See H.R. Rep. 95-464, *supra*, at 289. Accordingly, by regulation, the Secretary required that the states provide individual notice of these changes, either by sending an “individual notice of adverse action” to each affected household or by sending a “general notice” to all or part of the recipient population stating the reasons for the change. See 7 C.F.R. 273.12(e)(4). The following year, the Secretary established a new policy requiring general notices to be sent directly to affected households in the event of any mass change. See 43 Fed. Reg. 18896 (May 2, 1978) (proposed rule); 7 C.F.R. 273.12(e). The content requirements for these “individual” mass change notices were not expanded; the states were required to inform affected households of the nature of the mass change, but were not required to provide recipient-specific information. With minor modification in 1981, these regulations remain in place today.⁹

⁹ Plaintiff-respondents argue (Br. 29-30) that the final clause of Section 2020(e)(10), which was added in 1982 (Pub. L. No. 97-253, § 171, 96 Stat. 780), indicates that mass changes must be treated in the same way as adverse actions under Section 2020(e)(10). This does not follow. This final clause permits states to effectuate changes in food stamp benefits without notice or hearing where the information on which the change is made is provided by the recipient household. Such reductions are, by definition, household-specific. But for the 1982 amendment, they would be subject to the adverse action notice and hearing requirements. That Congress exempted such changes from the adverse action requirements carries no implication that mass changes—which were not subject to such requirements—are encompassed by Section 2020(e)(10).

Indeed, as pointed out in our opening brief (at 33-34), the same principle reflected in the final clause of Section 2020(e)(10) would suggest that no notice or hearing is required for mass changes. The two situations are similar in that they entail no factual disputes and the only risk of error is computational. The govern-

Plaintiff-respondents' principal response to our construction of the statutory and regulatory notice requirements (Br. 28-30)¹⁰ is to argue that “the very purpose and structure of § 2020(e)(10) within the Food Stamp Act” (Br. 28) prove that notices must be “sufficiently informative to allow participants to make a rational decision regarding whether or not to appeal” (Br. 29). However, this notion—which they dub a “matter of common sense” (Br. 30)—is of their own invention. It has not been the understanding of Congress or the Department that the notice—even a notice of adverse action—will necessarily be sufficient in itself to enable a recipient to decide whether to appeal his level of benefits. Rather, the notice is merely one element in an informative process.

Departmental regulations mandate that, upon request, the state agency must provide a recipient, without charge, with “the specific materials necessary . . . to determine whether a hearing should be requested or to prepare for a hearing.” 7 C.F.R. 273.15(i)(1). And when a recipient requests a fair hearing, regulations require that he be provided with all the documents and records pertinent to his case before the hearing takes place. 7 C.F.R. 273.15(p)(1). These procedures provide ample means for recipients to make an informed judgment on whether to file an appeal, without requiring the states to provide extensive recipient-specific information in all notices.

mental interest in prompt effectuation of such factually-uncontested changes (in both situations) outweighs the very slight risk that, without notice and a hearing, computational errors would occur. And, of course, should a household discover that its allotment was incorrectly computed in either situation, it would be protected by its right to a fair hearing.

¹⁰ Plaintiff-respondents' linguistic arguments, based on the supposed ordinary definition of the terms “adverse action” (Br. 24-25) and “individual” (Br. 28-29) have already been dealt with. Plaintiff-respondents' proffered definitions are at odds with the meaning of the terms as revealed by their regulatory context and by the legislative history.

Congress has indicated that it shares this approach. In the House Report on the Food Stamp Act of 1977, the committee stated that "[u]pon request, the state agency makes available without charge the specific materials necessary for a household or its representative to determine whether a hearing should be requested * * *." H.R. Rep. 95-464, *supra*, at 286. Thus, there is no requirement that a notice, even an adverse action notice, must provide sufficient information in itself "to allow participants to make a rational decision regarding whether or not to appeal" (Pl-resp. Br. 29). Rather, the notice is intended to inform the recipient that a change is being made, and to provide information on where to obtain further information and how to take an appeal.

The function of a mass change notice is even more modest. As pointed out in our opening brief (at 22), mass change notices serve the regulatory policies of enabling households to adjust their budgets to the changes and of reducing the need for client calls and visits to caseworkers with questions. It is not expected that routine computerized calculations, based on existing file data, will ordinarily generate errors, confusion, or even controversy (except of a legislative sort). It does not follow from the purpose of these notices that they must contain the elements of information that plaintiff-respondents demand.

Section 2020(e)(10) cannot, therefore, be read to require advance notice of mass changes in the Food Stamp program. The notice requirements to which the statute refers apply solely to household-specific "adverse actions." The mass change notice regulation, 7 C.F.R. 273.12(e)(2)(ii), is not susceptible to a construction that would require recipient-specific information (prior benefit amount, new benefit amount, amount of earned income). As discussed above, the regulation simply requires that notice be sent to affected households informing them of the mass change. The Massachusetts notice plainly satisfied this requirement.

Even if the Department's regulations do not reflect the best, or the only, interpretation of the notice requirements of the Food Stamp Act, that interpretation should be upheld so long as it is "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5.¹¹ The regulations in question were promulgated pursuant to a broad, explicit delegation of legislative rulemaking authority to the Secretary. 7 U.S.C. 2013(c); see *Knebel v. Hein*, 429 U.S. 288 (1977). Where, as here, Congress has not expressly set the contours of a notice requirement, but "explicitly left a gap for the agency to fill" (*Chevron*, slip op. 5), the agency interpretation is entitled to particular weight.

Policies for administration of the Food Stamp program have been developed largely by means of regulation rather than statutory prescription. The original Food Stamp Act of 1964 established only the general outlines of the program, leaving broad discretion in the Secretary to decide how to set up and administer it. See Pub. L. No. 88-525, 78 Stat. 703 *et seq.* As has been discussed, the notice requirements applicable to the program originated in the Secretary's regulations; even now, Congress has not attempted to restate the large part of those requirements, but has presupposed those requirements in amending the Act. It is difficult to imagine a stronger case for deference to the administrative interpretation.

C. The Massachusetts Notice Satisfied Or Exceeded Constitutional Requirements

1. In our opening brief (at 12-34), we explained that no individual notice whatsoever was required of the

¹¹ See also, *inter alia*, *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, No. 82-1071 (June 5, 1984), slip op. 8; *American Paper Institute, Inc. v. American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 19-20; *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

statutory change in food stamp benefits, because Congress is free to modify noncontractual welfare benefit levels without individual notice to affected individuals, and to implement changes immediately. Plaintiff-respondents have no response other than to assert (Br. 47) that "[t]his is not a case in which the plaintiffs have challenged the authority of Congress to decrease the amount of the earned income disregard that they had been receiving." They say that they seek only the ability to challenge "the amount or fact of the specific proposed reduction in [their] individual case" (Br. 47-48). Apparently, plaintiff-respondents do not challenge Congress's authority to *amend* the law, but only its ability to *implement* it.

Let us take a simple example. Congress votes to reduce¹² food stamp benefit levels by half, effective upon enactment. According to plaintiff-respondents' theory, Congress could not do so. The states would first have to provide notice to every food stamp recipient, informing them of the change, their former benefit level, their new benefit level, and the method of computation. Each recipient would then have the opportunity to obtain a hearing in advance of the change, to ensure that the change is computed accurately. The result of such a procedure, of course, would be to guarantee recipients continued enjoyment of benefits at a level twice that established by law.

This scenario is in direct conflict with this Court's established principles that food stamp benefits, like other noncontractual public benefits, "may be altered or even eliminated [by Congress] at any time" (*United States*

¹² The example is equally apt if Congress votes to *increase* benefits in other entitlements programs, such as Aid to Families with Dependent Children, Social Security, or Supplemental Security Income. Such increases (because they would affect a household's unearned income) would entail reductions in food stamp benefits. Indeed, this is the more common type of "mass change." See 7 C.F.R. 273.12(e) (2) (i) and (3) (i).

Railroad Retirement Board v. Fritz, 449 U.S. 166, 174 (1980) (emphasis added)), and that due process hearing rights "cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits" (*Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (citation omitted)). Nor can it be justified on the basis of *Goldberg v. Kelly*, 397 U.S. 254 (1970) (see Pl-resp. Br. 48-49). *Goldberg* involved the procedures necessary to protect an individual's right to statutory benefits *in accordance with* the levels and standards established by Congress. If John Kelly's factual contentions in *Goldberg* were correct, then he was entitled under law to retain his prior benefits. By contrast, in the instant case, members of the plaintiff class are not entitled to continuation of their prior benefits, no matter what their individual factual claims may be.¹³ They have no "property interest" in continuation of their prior benefit level; their benefits have been reduced by law. See *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 798 (1980) (Blackmun, J., concurring); *Kizas v. Webster*, 707 F.2d 524, 537 n.64 (D.C. Cir. 1983), cert. denied, No. 83-731 (Jan. 9, 1984).¹⁴

Plaintiff-respondents contend (Br. 50) that this conclusion would mean that a household with no earned in-

¹³ As noted in our opening brief (at 19-20 n.20), there is no need in this case to consider the different questions that would arise if a congressional change in benefits required new factual determinations.

¹⁴ Plaintiff-respondents argue (Br. 49) that this position was rejected in *Yee-Litt v. Richardson*, 353 F. Supp. 996 (N.D. Cal.), aff'd summarily, 412 U.S. 924 (1973). However, *Yee-Litt* affirmed the distinction between factual determinations and legal changes, requiring due process procedures where the distinction, as drawn by the state, was so unclear and unmanageable that it resulted in the denial of "pre-termination hearings to welfare recipients who have raised *factual* issues on appeal." 353 F. Supp. at 999 (emphasis added).

come that was terminated from the program would have no right to a hearing. This is simply false. Such a household would have a right to a hearing to challenge the termination, just as a household would have a right to a hearing if it simply ceased to receive benefits due to an unknown and undetected error. Merely because no notice need be supplied when Congress changes benefit levels does not mean that errors, when brought to the attention of the authorities, need not be corrected.

2. Our opening brief (at 35-43) also demonstrated that, assuming some notice of the change in the earned income disregard was required, the Commonwealth's notice was sufficient.¹⁵ One of the reasons for this is that the risk of erroneous deprivation from implementation of the change was minimal. Plaintiff-respondents challenge this conclusion (Br. 52-56).

Plaintiff-respondents first challenge (Br. 53-54) our observation that any errors caused by a backlog in the entry of monthly income data have no bearing on this

¹⁵ The court of appeals, relying on First Circuit precedent antedating *Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246 (Apr. 30, 1984) (see, e.g., *Lynch v. Dukakis*, 719 F.2d 504, 513 (1st Cir. 1983)), reviewed the district court's findings on this and other aspects of the due process analysis under the "clear error" standard of Fed. R. Civ. P. 52(a), even though it recognized those findings as ones of mixed law and fact (Pet. App. A19). The court of appeals concluded that, since the district court had "applied the appropriate legal standard, the *Mathews* balancing test," its task was "limited" to reversing only for clear error (Pet. App. A20). As we pointed out in our opening brief (at 32 n.30), the application of the "clear error" standard to mixed questions of law and fact was rejected by this Court in *Bose Corp.*, slip op. 15. Plaintiff-respondents' treatment of this issue (Br. 64-68) is totally unresponsive. Our point is not that "Rule 52(a) is inappropriately applied in cases involving constitutional adjudication" (Pl.-resp. Br. 66), but that it is inappropriately applied to mixed questions of law and fact. The holding in *Bose Corp.* on which we rely was not, as plaintiff-respondents contend (Br. 65) "expressly limited" to determinations of actual malice in libel suits. See *Bose Corp.*, slip op. 15.

case. They profess to find it "strange" and the "height of audacity" to suggest that errors stemming from pre-existing deficiencies in the file data should not affect the procedures for implementing unrelated statutory changes in benefit levels. However, the plain fact of the matter is that any errors resulting from a data entry backlog would have occurred whether or not the earned income disregard was changed. The backlog admittedly increased the risk of errors, but not the risk of errors *resulting from the statutory change*. And as a matter of law, the risk of unrelated errors does not support a requirement of notice.

Second, plaintiff-respondents attempt (Br. 54-55) to rehabilitate the credibility of the flawed "random sample" they introduced in district court. While acknowledging that they included 17 pages from a different data series in their study, they contend that this error "merely enhances the lower courts' conclusions" (Br. 54). The basis for this startling contention is their unsupported assertion that none of the cases included in the 17 erroneously considered pages contained an erroneous reduction or termination of benefits. The record provides no support for this assertion.¹⁶ Although logically there should be no errors stemming from a change in the earned income disregard in those 17 pages (since none of those households had earned income), the same is true of the households with no earned income properly included in the study. Just as extraneous errors from other causes were reflected in the households properly in the study, we would expect that extraneous errors would be reflected in the 17 pages improperly included. Since we do not know how many such errors there were, or what might be their source, we cannot rely on the study as a whole.

¹⁶ The full "random sample" is not in the record; only two representative pages were introduced.

More to the point, we showed in our opening brief (at 30-31 & n.27) that the errors actually identified in the study were attributable to an unrelated (and promptly corrected) error in the treatment of the \$10 minimum benefit. Plaintiff-respondents concede that this was an "additional programming flaw" (Br. 55)—not an error in the calculation of the earned income disregard. They also concede (Br. 55) that one of the two identified errors in the sample page from the study "might have been affected by the minimum benefit error."¹⁷ This directly contradicts their statement that "the random sample identified only those programming errors which logically flowed from the nature of the change [in the earned income disregard]" (Br. 55). The presence of unrelated errors in the study makes it useless for purposes of this case.

In any event, the significance of this flawed study should not be overstated. The principle of law at issue transcends any dispute over the accuracy of this computer program, and the holding of this Court will affect the administration of welfare programs across the nation. The requirements of due process must, of necessity, be evaluated according to a general assessment of probabilities, not according to a post hoc view of the results in the particular instance. The position of the federal respondent is that mere arithmetic calculations of revised benefit levels, based on existing data, do not give

¹⁷ We do not understand why plaintiff-respondents assert (Br. 55) that the other erroneously-treated household on the sample page from the study was unaffected by the minimum benefit error. The household had been receiving the minimum benefit, and then was erroneously terminated. Although it cannot be known with certainty, the most logical deduction is that this error stemmed from the same source. (It seems more than a coincidence that every household in the study identified as suffering an error had previously been receiving the \$10 minimum benefit.) In any event, since the household had no earned income, it is clear that the error did not result from the change in the earned income disregard. That is the only fact of significance to this litigation.

rise to sufficient risk of error to justify requiring individualized notices and hearings. Moreover, we contend that the system of individual notices and hearings is not needed or well-suited to mass changes, since any programming error would affect thousands of recipients in an identical fashion, and thus would be rapidly discovered and corrected. See *O'Bannon v. Town Court Nursing Center*, 447 U.S. at 799-801 (Blackmun, J., concurring).¹⁸ In addition, the procedures for reducing error built into the system (described in our opening brief at 5-7) are constitutionally sufficient.

Plaintiff-respondents' "random sample" does not affect the validity of these conclusions. The sole relevance of the "random sample," according to the court of appeals (Pet. App. A25), is that it purported to show that "a number of errors did occur, the simple ministerial nature of the change notwithstanding." Given the flaws in the study, we believe that it has not been shown that *any* errors resulted from implementation of the statutory change. But even if there were such errors, neither the courts below nor plaintiff-respondents have shown any justification for a general constitutional rule that all statutory changes in benefit levels, even those that are accomplished by means of arithmetic calculations based on preexisting data, must be preceded by recipient-specific notices.

Such a constitutional rule would seriously disrupt the uniform administration of federal benefit programs.

¹⁸ As Justice Blackmun stated, "When governmental action affects more than a few individuals, concerns beyond economy, efficiency, and expedition tip the balance against finding that due process attaches." *O'Bannon*, 447 U.S. at 800. Here, the change in the earned income disregard affected some 16,000 residents of Massachusetts. It is foolish to suppose that a computer error affecting all or large classes of these individuals would be corrected through the process of individual hearings. Rather, the error (if any) would be promptly identified and corrected for the entire class, as was the case with the Commonwealth's error in the calculation of the \$10 minimum benefit (J.A. 49, 250).

Program requirements for state-administered programs are necessarily set in accordance with the capabilities of all states, not just those that, like Massachusetts, have a highly-developed computerized administration system. Administrators of the Food Stamp program estimate that no more than a dozen states would have the computer capability to generate the sort of notice required by the courts below. And parallel problems would be created for Aid to Families with Dependent Children, which is administered on a similar basis and has similar notice requirements. See 45 C.F.R. 205.10(a)(4)(iii). Thus, even if the district court was correct that the detailed notice required below would have been administratively feasible for Massachusetts (Pet. App. A75-A76)—a question of policy better decided by those entrusted by Congress with administration of the program—that conclusion should not have served as the basis for a constitutional rule.¹⁰

Nor would the effect of an affirmance here be confined to statutory reductions in federal welfare programs. As pointed out in our opening brief (at 33-34) and not

¹⁰ In this connection, we would reiterate the concern expressed in our opening brief (at 36 n.31) that the test announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976), may not be appropriate for evaluating the sufficiency of notice. Plaintiff-respondents (Br. 51 n.33) call this problem a "red herring," claiming that the *Eldridge* analysis is simply a "further refinement" of the notice standards of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978). However, the *Mullane-Memphis Light* standard for sufficiency of notice is set in terms of objective reasonableness, which will not change from case to case or state to state. The *Eldridge* factors, by contrast, are essentially a cost-benefit standard. As applied by the courts below, notice requirements under the *Eldridge* standard will vary according to the capabilities of various states under various contingencies. As we pointed out (Br. 36 n.31), and plaintiff-respondents have not answered, the government's inability to anticipate what standards might be imposed by the courts under *Eldridge* creates serious risks of disruption of the program.

answered by plaintiff-respondents, it is difficult to find a limiting principle in the holding below. The risk of inadvertent computational error exists whenever the government sends out a check, makes a deduction, or provides a benefit. It exists whether the benefits are reduced, increased, or kept the same. It simply cannot be the case that whenever the government performs a computation, it must provide advance notice with sufficient information to enable affected individuals to check the arithmetic and request a hearing.

Plaintiff-respondents also exaggerate the value of recipient-specific notices as a means of discovering and correcting errors. They assert (Br. 56) that the "unchallenged testimony of Dr. Mark Bendick, a world-renowned expert on the administration of public assistance programs" was that "errors could have been detected and avoided in the main" through the provision of recipient-specific information (citing J.A. 95-96). The record does not support this reading. Although Dr. Bendick strongly endorsed the provision of recipient-specific information (even in mass change situations), he did so because it would reduce unnecessary appeals and inquiries to the agency (J.A. 95). Dr. Bendick expressed no opinion on whether such notices would reduce substantive errors in food stamp allotments.

On a common sense level, it is difficult to understand why plaintiff-respondents place so much emphasis on receiving the old benefit amount, the new benefit amount, and the amount of earned income. A recipient household would be aware of the old benefit amount from last month's allotment and would learn the new benefit amount from the new allotment. And the earned income figure, by itself, would generally be insufficient for the household to be able to compute the change in its benefit level resulting from the reduction in the earned income disregard, because further computations are required before actual benefit levels can be deduced. See 7 C.F.R. 273.10 (e)(2). Unless the state agency were required to sup-

ply extensive backup file data to explain the relationship of the earned income figure to the actual benefit level (a procedure that would be quite costly and probably beyond the capabilities of most states), the notice would be likely more to confuse than to inform.

This reinforces the wisdom of avoiding detailed constitutional requirements for the contents of notices. The essential ingredient, as this Court held in *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14-15 (1978), is that the notice inform its recipient "of the availability of a procedure for protesting" the proposed action. The notices here satisfied this basic requirement.²⁰

Plaintiff-respondents also state (Br. 56) that the district court found that without recipient-specific information, "recipients could not even discover any mistakes, much less attempt to have them corrected." However, as pointed out above (see pages 15-16, *supra*), neither Congress nor the Department has intended that notices be the recipients' sole source of information. Thus, while it is true that mistakes might not be detected on the basis of the notice alone, recipients would quickly become aware of their new benefit levels when their allotment card arrived about ten days later; if they had any doubts about the correctness of the allotment, they would have the right

²⁰ Plaintiff-respondents misleadingly truncate a quotation from *Memphis Light* that underscores our point (Br. 62, quoting *Memphis Light*, 436 U.S. at 14-15 n.15):

Here, however, the notice is given to thousands of customers of various levels of education, experience and resources. Lay consumers of electric service, the uninterrupted continuity of which is essential to health and safety, should be informed clearly. . . .

Deleted from the end of this quotation was the following:

of the availability of an opportunity to present their complaint. In essence, recipients of a cutoff notice should be told where, during which hours of the day, and before whom disputed bills may be considered.

to "the specific materials necessary * * * to determine whether a hearing should be requested" (7 C.F.R. 273.15 (i)(1)); and they were fully informed about how to obtain further information or a hearing. Indeed, plaintiff-respondents' own expert, Dr. Bendick, testified that the "tendency" of a food stamp recipient under these circumstances is "to approach the agency to seek clarification of the information" (J.A. 96). Thus, although recipient-specific notices might provide information more quickly, and with fewer unnecessary inquiries to the agency, it simply is not true that they are indispensable for recipients to discover mistakes or have them corrected.²¹

The notices actually provided by the Commonwealth contained no inaccuracies that have been identified in this litigation,²² used terms that are "generally familiar" to food stamp recipients (Pet. App. A96), and were sufficiently informative to enable each of the named plaintiffs, whose claims are representative of the class (Fed. R. Civ. P. 23(a)), to file an appeal and obtain a fair hearing. Certainly the notices could have been clearer or contained more information, but the Constitution does not require it. The proper avenue for seeking improvements in the form and content of mass change notices in the Food Stamp program is to request changes from the states and the Department (or Congress)—not to sue in federal court.

²¹ The district court's finding on this point (Pet. App. A70-A71) was simply that recipients could not detect errors on the basis of the notice; the court did not imply that it was not possible through other readily available sources of information.

²² Plaintiff-respondents assert, without elaboration, that the notices contained "misleading language" (Br. 61); however, they have never identified any inaccuracies or suggested any ways in which the notices might plausibly have been misinterpreted.

II. THE DISTRICT COURT'S REMEDIAL ORDER WAS BEYOND THE COURT'S STATUTORY AND EQUITABLE AUTHORITY AND IN VIOLATION OF SOVEREIGN IMMUNITY

A. Neither The Food Stamp Act Nor Principles Of Equitable Discretion Justify The District Court's Order To Provide Food Stamp Benefits In Amounts Exceeding The Level Established By Congress

The district court ordered the Commonwealth to "return" all food stamp benefits "lost" to the plaintiff class as a result of the action taken pursuant to the December notice, for the period between January 1, 1982, and the earliest of the household's recertification, the date the household was terminated or withdrew for other reasons, or the date the household was provided a legally sufficient notice (Pet. App. A101). The effect was to require the Commonwealth to pay food stamp benefits at a level higher than that set by Congress for a period of up to one year.

The court of appeals reversed this remedial order. The court pointed out that there had been no "showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated" (Pet. App. A33). The court reasoned, therefore, that "[r]estoration of benefits would constitute a windfall to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress" (*ibid.*).²³

²³ The court also stated that the order of retroactive benefits would not provide any incentive to the states to correct the problem—and indeed might even be seen as an "attractive possibility"—since the federal government fully finances the Food Stamp program and thus would bear the cost. While this point has considerable validity as a practical matter, it should be noted that, as a legal matter, the state might ultimately be obligated to bear the cost of such an order under some circumstances. Although the federal government would redeem the additional food stamps in the first instance (7 U.S.C. 2013(a)), the Secretary is authorized to recover from the states the cost of certain overissuances. 7 U.S.C. 2020(g); see also 7 U.S.C. 2016(f), 2025(d); *Woods v. United States*, 724 F.2d

Plaintiff-respondents challenge this holding. They contend, in the alternative, that the plaintiff class was correctly awarded the retroactive benefits as a matter of statutory entitlement under 7 U.S.C. 2023(b) and that the remedial order was within the district court's equitable discretion. Neither argument has merit.²⁴

1. The statute upon which plaintiff-respondents rely, 7 U.S.C. 2023(b), provides:

In any judicial action arising under this chapter, any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action * * *.

Reasoning that "actions taken in violation of federal statutory and regulatory procedural requirements are 'wrongful'" (Br. 42), plaintiff-respondents contend that whenever a procedural error occurs in the course of effectuating a reduction in benefits, the allotment is "wrongful," whether or not the allotment is substantively correct. Thus, in the instant case, even though Congress lawfully reduced food stamp benefits for recipients with earned income, the allotments of the plaintiff class were "wrongfully withheld" because the Commonwealth's notice of the lawful reductions was inadequate.

This position is absurd on its face and would, as the court of appeals stated, result in a "windfall" to plaintiff-respondents. Plaintiff-respondents themselves acknowledge that their right at stake in this litigation is "not * * * the right to the continued receipt of any given

1444 (9th Cir. 1984). If a state's failure to comply with statutory or constitutional standards in providing notice is the cause of payments in excess of the statutory level, the Secretary might be justified in recovering the excess amount from the state.

²⁴ If this Court agrees with our submission that the Massachusetts notices did not violate the Constitution, the Food Stamp Act, or the Department's regulations, there is no need for the Court to address the remedial issues discussed in this portion of our brief.

amount of benefits, but rather the right to the receipt of the correct amount of benefits" (Br. 49). The "correct" amount of benefits is the amount voted by Congress, no more and no less. We simply fail to see how the plaintiff class could be entitled to "benefits at a level exceeding that authorized by Congress" (Pet. App. A33), or could contend that the Commonwealth's failure to pay them benefits exceeding the statutory level constituted a wrongful withholding of benefits. While the court of appeals concluded (incorrectly, in our view) that proper notice was wrongfully withheld, it does not follow that any food stamp allotments were wrongfully withheld.

In any event, the legislative history of Section 2023(b) shows that the restoration remedy was intended for substantive errors in food stamp allotments, not procedural errors that did not affect the outcome. Section 2023(b) is a limit on the period of time for which courts in judicial review proceedings may restore benefits to states, retail establishments, or households. It is parallel to Section 2020(e)(11), which requires the states to provide for "the prompt restoration in the form of coupons to a household of any allotment or portion thereof which has been wrongfully denied or terminated" for a period of up to a year from the discovery or notification of the error. Both sections find their origin in prior regulatory provisions.

Prior to the Food Stamp Act of 1977, the Food Stamp program required participants to purchase their food stamp coupons with cash. 7 U.S.C. (1976 ed.) 2016(b). The coupons were sold at a discount. The difference between the value and the cost of the coupons was known as the "bonus." Initially, the Department required the states to recompense participants, by means of cash refunds, only when the household had "been overcharged for its coupon allotment as a result of an error by the State Agency" (37 Fed. Reg. 25322 (Nov. 30, 1972) (emphasis added)). The cost of such refunds was borne by the federal government. No retroactive adjustments

were required for wrongful terminations or determinations of ineligibility, or for errors that resulted in the receipt of fewer food stamps than the household was entitled to. This was on the theory that injuries to past food consumption could not be remedied. *Bermudez v. Department of Agriculture*, 490 F.2d 718, 720 n.2 (D.C. Cir.), cert. denied, 414 U.S. 1104 (1973). This interpretation of the Food Stamp Act was rejected by some federal courts. *Carter v. Butz*, 479 F.2d 1084 (3d Cir.), cert. denied, 414 U.S. 1094 (1973); *Bermudez*, *supra*.²⁵

In response to *Bermudez*, the Department adopted a new regulation that required states to provide retroactive corrections for substantive errors in benefit amounts, ineligibility determinations, or terminations (41 Fed. Reg. 11466 (Mar. 19, 1976), codified at 7 C.F.R. 271.1 (q) (1977) (emphasis added)):

Whenever an administrative error on the part of the State agency results in a household receiving fewer bonus stamps than it is entitled because the total coupon allotment received (if any) was smaller than the amount for which the household was actually eligible, the household shall be entitled to restoration of lost benefits.

In the Food Stamp Act of 1977, Congress discontinued the cash purchase system for food stamps. In amending the statutory scheme, Congress codified the regulatory benefit restoration provision, using terminology more appropriate to the revised system. This is the origin of 7 U.S.C. (Supp. II 1978) 2020(e)(11):

The State plan of operation . . . shall provide, among such other provisions as may be required by regulation—

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²⁵ It is significant that in *Bermudez*, every member of the plaintiff class had been deprived, through error, of food stamps to which they were entitled. None of the plaintiffs asserted a mere procedural error. 490 F.2d at 720 n.1.

(11) for the prompt restoration in the form of coupons to households of any allotment or portion thereof which has been wrongfully denied or terminated.

See Pub. L. No. 95-113, § 1301, 91 Stat. 972. Nothing in the legislative history suggests that Congress intended to alter the scope of the restoration provision; indeed, the House Report referred explicitly to the prior regulation as explanation for the provision. H.R. Rep. 95-464, *supra*, at 283-284. The report described the effect of Section 2020(e)(11) as follows (H.R. Rep. 95-464, *supra*, at 285 (emphasis added)):

Thus, if a household *lost benefits* because it was found to be ineligible when it was eligible or because its allotment was not as high as it should have been such benefits would be recouped in the form of allotment add-ons.

The statutory phrase "allotment * * * which has been wrongfully denied or terminated" (7 U.S.C. 2020(e)(11)) thus refers to "lost benefits," *i.e.*, substantive errors in allotment amount—not to procedural errors having no effect on the level of benefits.

Nor did the addition of 7 U.S.C. 2023(t) in 1981 create a right to retroactive readjustments for non-substantive errors. The 1981 amendments to the Food Stamp Act, in relevant part, Pub. L. No. 97-98, § 1320, 95 Stat. 1286-1287, limited the period of restoration of wrongfully withheld benefits to one year prior to discovery of the error. This was done by means of addition of a new clause to Section 2020(e)(11) and of a new Section 2023(b) to ensure that judicial remedies would be coextensive with administrative remedies. The legislative history makes clear that the sole purpose of this amendment—and thus the sole purpose of Section 2023(b)—was to *limit* the federal government's liability to restore "lost" food stamps benefits. H.R. Rep. 97-106, 97th Cong., 1st Sess. 11, 60 (1981). It would have been

entirely inconsistent with the cost-saving emphasis of the 1981 legislation (see *id.* at 5-58) to *expand* liability to include mere procedural errors that were not subject to the restoration provision under prior law. It is therefore clear that Section 2023(b), on which plaintiff-respondents rely, does not create a right to retroactive benefits for nonsubstantive errors in food stamp administration.

The conclusion that food stamp recipients are not entitled to retroactive benefit adjustments where their benefits were substantively correct is underscored by the provision for state recoupment of excess food stamp benefits from recipient households. If the household receives a continuation of benefits at the prior level during the pendency of a fair hearing (see 7 U.S.C. 2020(e)(10) (second clause); 7 C.F.R. 273.15(k)), and the state agency action is upheld, "a claim against the household shall be established for all overissuances." 7 C.F.R. 273.15(k)(1); see also 7 C.F.R. 273.18(b)(1)(iii).³⁶ In the absence of a substantive error in the food stamp allotment, the household is required to return all excess benefits it received during the pendency of the fair hearing. If members of the plaintiff class had received sufficient notice and had taken an appeal, they would not have been permitted to keep any benefits over the level to which they were substantively entitled; under no circumstances could they have retained a level of benefits in excess of that set by Congress. To grant members of the plaintiff class enhanced benefits to which they were not substantively entitled, therefore, does not merely "restor[e] the *status quo* existent before the Department's unlawful action," as plaintiff-respondents suggest (Br. 45); it gives them, as the court of appeals recognized, a windfall.

³⁶ These regulatory provisions for the recoupment of food stamp overissuances receive statutory recognition in 7 U.S.C. 2022(b), which governs the means by which state agencies may collect claims against households.

This demonstrates the fallacy in plaintiff-respondents' argument (Br. 38) that Congress intended to create a system in which "most households would receive, for a time, benefits at a level that is substantively incorrect." The rationale for the benefits continuation provision on which plaintiff-respondents rely is that the state, rather than the recipient, can better afford to stake the disputed amount while the question is being resolved. If, after the hearing, it is determined that the state's proposed action was proper, the household is required to pay back the excess. This does not, as plaintiff-respondents contend (Br. 39), support the view that food stamp households have a permanent "substantive entitlement to receive their prior level of benefits" during the hearing process.

Plaintiff-respondents' reliance on this score on *Sampson v. Murray*, 415 U.S. 61 (1974), is misplaced. *Sampson* established merely that under the express terms of the Back Pay Act, a Civil Service employee who is "found by appropriate authorities under applicable law or regulation to have undergone an unjustified or unwarranted personnel action" is entitled to reinstatement with back pay. 415 U.S. at 75 & n.31 (quoting 5 U.S.C. (1970 ed.) 5596(b)). See also *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 740 (1982) (citation omitted) (Back Pay Act "expressly provide[s] money damages as a remedy against the United States in carefully limited circumstances"). Civil Service regulations, in turn, expressly permitted employees to appeal dismissals "on the ground that [their] termination was not effected in accordance with the procedural requirements of [the regulations]." *Sampson*, 415 U.S. at 66 n.7 (quoting 5 C.F.R. 315.806(c) (1973)). The Food Stamp Act contains no such feature.

In this connection, a comparison of *Sampson* to *Codd v. Velger*, 429 U.S. 624 (1977), is instructive. In *Codd*, the plaintiff, a probationary employee who was discharged without a hearing on the basis of derogatory information placed in his file, sought job reinstatement

and compensatory damages as a remedy for the denial of a hearing.²⁷ This Court held, however, that he was not entitled to these remedies, because he had not alleged that there was an actual substantive error in the decision that had been made. "[I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's [liberty interest]." *Id.* at 627.

Codd thus demonstrates that the provision of retroactive monetary relief for procedural errors under the Back Pay Act, as discussed in *Sampson*, does not extend beyond the scope of that Act—even within the field of public employment. Even more farfetched is plaintiff-respondents' attempt to stretch the analogy of the Back Pay Act to create an implied right to enhanced benefits under the Food Stamp Act.

2. It follows that the district court's order cannot be justified as an exercise of its equitable discretion.

In the exercise of its discretion, a court is not free to disregard other laws. Specifically, as this Court has stated, the courts have a "duty . . . to observe the conditions defined by Congress for charging the public treasury." *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947). The level of food stamp benefits is established by Congress, not by the states or by the Secretary. As a general matter, a court's remedial authority is confined to the scope of discretion vested in the parties before the court; the court may not order a party to take actions outside his authority or in violation of law. In this instance, the court plainly erred in requiring the Commor vealth to pay benefits "at a level

²⁷ The employee might have been entitled to a hearing even though he had no property interest in continued employment, because he had a liberty interest that was infringed by the "stigma" caused by the presence of derogatory information in his employment file.

exceeding that authorized by Congress" (Pet. App. A33). Even if Massachusetts officials committed a procedural violation, the statutory benefit levels must still be honored. Cf. *Schweiker v. Hansen*, *supra*.

Plaintiff-respondents' position is directly in conflict with this Court's precedents. *Codd v. Velger*, *supra*, already discussed, stands for the proposition that, in the absence of a statutory provision to the contrary, the denial of a procedural protection does not give rise to a right of restitution or compensatory damages unless the procedural violation resulted in a substantive deprivation.

This Court's unanimous decision in *Carey v. Piphus*, 435 U.S. 247 (1978), is to similar effect. In *Carey*, the plaintiffs, high school students who were suspended from school without procedural due process, sought compensatory damages for the period of their exclusion from school. This Court held that the students could not recover such damages if the school officials could show on remand that they would have been suspended even if a proper hearing had been held. 435 U.S. at 260. The Court reasoned that, if the students would have been suspended anyway, "the failure to accord procedural due process could not properly be viewed as the cause of the suspensions." *Ibid*. Indeed, the Court stated that an award of damages under such circumstances "would constitute a windfall, rather than compensation," to the students. *Ibid*.²⁸

²⁸ The Court also held that the students would have an action for compensatory damages if they could prove "mental and emotional distress" as a result of the due process violation (435 U.S. at 262-264), and that they would be entitled under 42 U.S.C. 1983 to "nominal damages" (435 U.S. at 266-267). In the instant case, the district court did not purport to award damages for mental or emotional distress or nominal damages; nor would such damages be authorized under law against either the Commonwealth or the federal government.

The problem here is analogous. If the food stamp benefits of the plaintiff class would have been reduced even if the Commonwealth had provided sufficient notice, then the reductions were not caused by the supposed due process violation. The only relief to which plaintiff-respondents could be entitled, as the court of appeals held, is restoration of any benefits lost as a result of substantive computational errors. To award retroactive benefits to members of the plaintiff class whose food stamp allotments were correctly computed, at a level in excess of that authorized by law, would not be "restitution," as plaintiff-respondents characterize it (Br. 44, 47). It would "constitute a windfall" (*Carey*, 435 U.S. at 260).

Contrary to plaintiff-respondents' argument (Br. 41-42, 45-46), this Court's decisions in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), do not establish that the federal courts have general equitable authority to order retroactive relief against the federal government or the states. In both cases, the courts applied express statutory remedies. *Vitarelli* arose under the Administrative Procedure Act (see *United States v. Caceres*, 440 U.S. at 754 & n.18), which provides that a court may "set aside agency action" that is found to be "without observance of procedure required by law." 5 U.S.C. 706 (2) (D).²⁹ *Accardi* arose under habeas corpus (347 U.S. at 261), pursuant to which a court may ascertain whether the detention of an alien for purposes of de-

²⁹ Significantly, under the Administrative Procedure Act monetary relief is not available. 5 U.S.C. 702. Moreover, reviewing courts are required to take "due account * * * of the rule of prejudicial error." 5 U.S.C. 706. Thus, procedural errors are disregarded that "have no substantial bearing on the ultimate rights of parties." *Market Street Ry. v. Railroad Commission*, 324 U.S. 548, 562 (1945). It is not certain, therefore, that agency action would necessarily be set aside under the APA where, as here, there is no colorable claim that the procedural error could have affected the outcome.

portation is, for any reason, unlawful. *Ekin v. United States*, 142 U.S. 651, 662 (1892). Neither case involved the inherent powers of the court or the retroactive grant of benefits, without statutory authority, to persons who were not substantively entitled to them.

B. The District Court's Award Of Retroactive Benefits Is Precluded By The Eleventh Amendment And Principles Of Sovereign Immunity

This Court held in *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), that a suit by private parties against a state for retroactive payments of welfare benefits found to have been wrongfully withheld is barred by the Eleventh Amendment, unless the state has consented to suit. The same principles preclude an order of retroactive benefits in the instant case.

The district court's order, while nominally running against the Commissioner of Public Welfare, will in reality be satisfied "from the general revenues of the [Commonwealth of Massachusetts]." *Edelman*, 415 U.S. at 665. See also *Pennhurst State School & Hospital v. Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 10-11; *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Since the Commonwealth has not consented to suit for payment of benefits in excess of those authorized by Congress, the district court's award cannot stand.

The Commonwealth cannot be said to have consented to suit merely by virtue of its participation in the Food Stamp program. *Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Edelman*, 415 U.S. at 673. In its plan of operation, the Commonwealth was required to agree to provide for "the prompt restoration * * * of any allotment or portion thereof which has been wrongfully denied or terminated," for a period of up to one year prior to discovery of the error. 7 U.S.C. 2020(e) (11). As explained above (at 30-32), this provision ap-

plies only to substantive errors in the amount of food stamps allotted; it does not create an obligation to pay compensation for mere procedural errors. Nowhere else in the plan of operation or the statutory scheme is there any support for the proposition that the Commonwealth has consented to be sued for retroactive benefits in excess of those authorized by Congress.

The court of appeals rejected the Commonwealth's Eleventh Amendment argument solely because "the cost of the food stamp program is borne by the federal government" (Pet. App. A36 n.6). However, the federal government ultimately only bears the cost of redeeming food stamp coupons issued in compliance with the Act. The federal government is not obligated to bear the cost of benefits in excess of those authorized by Congress, whether they were issued erroneously by the Commonwealth or required to be issued as a result of a procedural violation by the Commonwealth. Should the district court's order be reinstated, the Secretary would be authorized to attempt to recover the cost from the Commonwealth. See note 23, *supra*.

In any event, an order for retroactive payment of benefits would be equally barred by sovereign immunity if it ran against the federal government instead of the Commonwealth. The federal government, no less than the Commonwealth, is protected against retroactive monetary liability in the absence of consent, even for due process violations. *United States v. Testan*, 424 U.S. 392, 399 (1976); see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Monaco v. Mississippi*, 292 U.S. 313, 321 (1934). And the United States has plainly not consented to be sued for food stamp benefits in excess of those authorized by Congress, on account of procedural derelictions by a state.³⁰ There is no federal statute that "can fairly be interpreted as mandating

³⁰ The courts below did not find that the federal respondent violated any of plaintiff-respondents' constitutional rights.

compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 400 (citation omitted).

Whether the district court's order would ultimately result in liability against the Commonwealth or the United States is, therefore, immaterial; under either contingency the suit would be barred.

C. The District Court Was Not Justified In Requiring the Commonwealth To Undertake Rulemaking Under Court Supervision

Congress has entrusted responsibility for administering the Food Stamp program to the Secretary and the states. The district court's order usurped the Commonwealth's authority to determine whether regulations are needed, and assumed an unwarranted degree of judicial control over the rulemaking result.³¹ Such a remedy is extreme, to be imposed only where there is clear evidence that the state involved will not comply with the law. See *Allen v. Wright*, No. 81-757 (July 3, 1984) slip op. 21 ("suits challenging . . . the particular programs agencies establish to carry out their legal obligations . . . are rarely if ever appropriate for federal-court adjudication"); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951) ("[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law'"); *Laird v. Tatum*, 408 U.S.

³¹ Any rulemaking would be subject to judicial review under appropriate provisions of Massachusetts law. However, the district court order would apparently entail a standard of review of the Commonwealth's regulations far more stringent than the traditional "arbitrary and capricious" standard appropriate to rulemaking proceedings of this type (see, e.g., *American Family Life Assurance Co. v. Commissioner of Insurance*, 388 Mass. 468, 478, 446 N.E.2d 1061, 1066-1067 (1983)), and would transfer review of this state rulemaking from the state to the federal courts.

1, 15 (1972) (federal courts should not act "as virtually continuing monitors of the wisdom and soundness of Executive action").

The district court's requirement that the Commonwealth's regulations be submitted to the court for advance approval is particularly inappropriate in light of the congressional determination to preclude federal advance approval of state agency methods of administration. See Pub. L. 97-253, § 166, 96 Stat. 779, codified at 7 U.S.C. 2020(d). It would require quite unusual circumstances—wholly absent here—to justify a federal court in assuming administrative supervision authority that Congress has explicitly denied to the Secretary.

In this case, the district court made no findings, and supplied no rationale, that would support the remedial order. One can only guess whether the district court issued the order with due regard for the adequacy of alternative, less-intrusive remedies or with due respect for the sovereignty of the Commonwealth of Massachusetts. Contrary to plaintiff-respondents' assertion (Br. 31), the district court manifestly did not indicate that it was "cognizant" of the factors it should consider in deciding whether to impose injunctive relief on a state. Thus, the normally deferential scope of appellate review of routine district court decisions whether to issue injunctions, where the court's articulation of the basis for its decision indicates that it has exercised its discretion within appropriate bounds (see *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)), would have been out of place in reviewing this unusual and unexplained order.

In any event, the court of appeals correctly observed that there is nothing in the record to indicate that the Commonwealth has acted in bad faith, and no reason to doubt that it will comply with legal requirements in the future (Pet. App. A37-A38). See *W.T. Grant Co.*,

345 U.S. at 633 (“[t]he necessary determination [for the granting of injunctive relief] is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive”). The court of appeals’ conclusion is well supported by the record. The Commonwealth was in facial compliance with federal regulations governing the question of notice. Therefore, even if the Commonwealth and the federal respondent are incorrect in the submission that those regulations are consistent with statutory and constitutional standards, the Commonwealth had every reason to believe that its action was lawful.²² Especially in the absence of any findings or explanation by the district court, the court of appeals was fully justified in concluding that no injunction was necessary to ensure future compliance, and that continuing judicial surveillance of the Commonwealth’s administrative decisions would be inappropriate.

Plaintiff-respondents rely principally (Br. 31, 35-36) on *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), and *Calfano v. Yamasaki*, 442 U.S. 682 (1979). In *Hecht Co.*, however, this Court affirmed the district court’s refusal to grant an injunction, rejecting the government’s argument that, in the circumstances of that case, an injunction was mandatory. 321 U.S. at 330-331. The Court’s statement that “[t]he historic injunctive process was designed to deter, not to punish” (*id.* at 329) was not, as plaintiff-respondents suggest (Br. 35), an instruction to the lower courts to disregard the good faith of the parties; on the contrary, to the extent that *Hecht Co.* has any bearing on this case, it supports the court of ap-

²² Of course, that the Commonwealth was “on notice of exactly what information plaintiffs considered essential” (Pl-resp. Br. 34 (emphasis added)) has no bearing on the Commonwealth’s good faith compliance with the operative regulations as they stood at that time.

peals’ position that an injunction is not appropriate unless it is likely to be necessary to deter unlawful conduct in the future.

Plaintiff-respondents’ reliance on *Yamasaki* is similarly unavailing. There, the Court simply affirmed (442 U.S. at 705-706) that injunctive relief is *available* under Section 205(g) of the Social Security Act, 42 U.S.C. (Supp. V) 405(g); the Court did not address whether an injunction was “appropriate” under the circumstances of the case, as plaintiff-respondents state (Br. 34-36).

Nothing in these or any other decisions of this Court suggests that the good faith of the defendant and the likelihood of voluntary compliance in the future are improper factors for an appellate court to consider when reviewing the grant of injunctive relief.²³

²³ *Pennhurst State School & Hospital v. Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 18 n.17, does not suggest that the absence of bad faith should not be considered (see Pl-resp. Br. 34). The Court held only that the absence of bad faith “does not affect whether an injunction *might* be issued * * * by a court possessed of jurisdiction” (emphasis added).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals on the issue of the validity of the Commonwealth's notice should be reversed; but if it is affirmed, the judgment of the court of appeals on the issue of remedy should also be affirmed.

Respectfully submitted.

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REPLY BRIEF

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

GILL PARKER *et al.*,
Petitioners,

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, *et al.*

CHARLES M. ATKINS, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
Petitioner,

v.

GILL PARKER, *et al.*

On Writs Of Certiorari To The United States
Court Of Appeals For The First Circuit

**REPLY BRIEF FOR
PARKER, ET. AL.**

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POINT I

**THE FIRST CIRCUIT CORRECTLY DETERMINED THAT
THE FOOD STAMP ACT REQUIRES MEANINGFUL
ADVANCE NOTICE OF THE CHANGES AT ISSUE HERE**

The court of appeals held that 7 U.S.C. § 2020(e)(10) requires "meaningful advance notice" of all reductions or terminations of a household's food stamp benefits except where such agency action is based upon a written statement received from the household itself [PA 29-30]. Nonetheless, the Secretary now proposes explicitly what was only implied in his earlier brief, *i.e.*, that the 1977 amendment to § 2020(e)(10) did nothing more than adopt his existing regulations.¹ Since those regulations did not require meaningful notice, the argument goes, neither does the statute. This contention is proffered despite the fact that, as the Secretary admits (reply br. at 12), the amendment introduced a term, "individual notice of agency action", which did not exist in the regulations.² The

¹ This suggestion does not respond to the fact that, as plaintiffs pointed out in their first brief (at 25-26), Congress has in other sections of the Act stated that it was adopting the Secretary's regulations when it chose to do so. *See, e.g.*, 7 U.S.C. § 2014(g). No such intention is mentioned in § 2020(e)(10).

² It is not disputed that Congress amended § 2020(e)(10) in 1977 by adding the language at issue in this case. Since legislative amendments are not to be considered superfluous undertakings, *Uptagrafft v. U.S.*, 315 F.2d 200, 204 (4th Cir.), cert. denied, 375 U.S. 818 (1963), it must be presumed that the Congressionally enacted change accomplished something. If, as the Secretary contends, Congress was perfectly satisfied with his existing procedures, it is difficult to perceive why it at the last minute decided to amend this pre-existing section of the Act at all. When the "legislative history" relied upon by the Secretary (H.R. Rep. 95-464) was written in 1976, certainly no such change was contemplated. (*See* plaintiffs' main brief at 26.) Contrary to the Secretary's suggestion (reply br. at 13 n.6), it was not only the description of the existing regulations that was written before § 2020(e)(10) was amended, but also the portion of the Report entitled "Committee Action." Thus, the only legislative history written with the amendment to § 2020(e)(10) in mind, and consequently the only language that can elucidate the meaning of that amendment,

argument suggests a novel approach to statutory construction that requires an act of Congress to be read to conform with existing agency regulations, rather than the usual approach which dictates that agency regulations be judged within the parameters of the act they are promulgated to implement. No authority is offered in support of this suggestion, almost certainly because none exists. Further, inspection of the purported regulatory foundation for the Secretary's argument reveals its inherent instability.

In his effort to belittle the significance of the 1977 amendment to § 2020(e)(10), and the "individual notice" regulation that he promulgated in response thereto in 1978, the Secretary has been forced to ignore distinctions that exist in his own regulatory system. Throughout his reply brief, the Secretary equates the "individual notice" added to the regulations in 1978 (7 C.F.R. § 273.12(e)(2)(ii)) with the "general notice" that has been in the regulations since 1974.³ See *e.g.*, reply br. at 14. However, the regulations themselves, as well as the Secretary's comments upon their promulgation, make clear that these two types of notice are entirely distinct and are designed to serve different purposes.

is the Conference Committee Report (Sen. Rep. 95-418; Hse. Rep. 95-599, 95th Cong., 1st. Sess. (1977)) which emerged from the reconciliation of the Senate and House versions of the 1977 Act. That report makes clear that Congress was not merely adopting terms of art already contained in the existing regulations.

³ Until September 4, 1981, the provision for general notice was found in 7 C.F.R. § 273.12(e)(1)(ii). The text of that section is quoted in the body of this brief, *infra* at 3. In promulgating the regulations designed to implement the OBRA changes of 1981, the Secretary made some technical amendments to § 273.12(e)(1)(i). 46 Fed. Reg. 44719 (9/4/81). In doing so, he seems to have inadvertently deleted § 273.12(e)(1)(ii) from his regulations. If the deletion was not inadvertent, it was certainly without explanation or comment. 46 Fed. Reg. 44719. Plaintiffs will refer to § 273.12(e)(1)(ii)(1981) as if it still exists, but whether or not that is true has no bearing on the force of their argument, for that section unquestionably existed simultaneously with § 273.12(e)(2)(ii)(the "individual notice" provision) at least from 1978 through 1981.

That "individual" and "general" notices are distinct entities is established by the language of § 273.12(e)(1)(ii)(1981) itself, which sets forth the implementation procedures to be used in effectuating certain types of federal adjustments to benefit levels. It provides in relevant part:

Although a notice of adverse action is not required, State agencies *may* send an individual notice to households of these changes. State agencies *shall* publicize these mass changes through the news media; posters in certification offices, issuance locations, or other sites frequented by certified households; or general notices mailed to households. (emphasis added)

From the above language, it is obvious that individual and general notices are different. Use of the former is permissive for the types of mass changes covered by § 273.12(e)(1), while it is mandatory for the changes addressed by § 273.12(e)(2). See § 273.12(e)(2)(ii) and plaintiffs' main br. at 28 n.16. In contrast, use of a general notice, or the listed alternatives, is mandatory to announce the types of changes covered by § 273.12(e)(1).⁴ This entire section makes absolutely no sense if, as the Secretary now professes, the two terms are interchangeable.

Further, the Secretary's new-found position is inconsistent with his (or his predecessors') earlier understanding of the purposes of the two types of notice. When the concept of general notice was first introduced in 1974 in 7 C.F.R. § 271.1

⁴ The language of § 273.12(e)(1)(ii)(1981) also undoes the Secretary's contention (reply br. at 9-10 n.4) that "[i]ndividual notice simply means notice provided to each individual household; the term indicates that general notice to the public through the Federal Register or the mass media is not sufficient." As the language of § 273.12(e)(1)(ii) makes clear, general notice is not synonymous with federal register or mass media notice, it is an alternative to them, one that must be "mailed to households." See also, 7 C.F.R. § 271.1(n)(3)(1975), as quoted in the Secretary's reply br. at 12. Thus, the Secretary's "interpretation" negates any distinction between general and individual notice and renders meaningless their separate existence in §§ 273.12(e)(1)(ii)(1981) and 273.12(e)(2)(ii), respectively.

(n)(3)(1975), the Secretary stated that it was intended to "provide households in a reasonable manner with an indication that *some change in their program status* should be expected." 39 Fed. Reg. 25996 (July 15, 1974)(emphasis added). Thus, this provision, which was promulgated well before 7 U.S.C. § 2020(e)(10) was amended to require individual notice, was certainly designed to achieve only a very modest goal. However, following the amendment to § 2020(e)(10), the Secretary promulgated new "mass change" regulations which left intact the concept of general notice (7 C.F.R. § 273.12(e)(1)(ii)(1981)) but added, for the first time, a category of changes that had to be implemented pursuant to an "individual notice" (§ 273.12(e)(2)(ii)). The function of the new individual notice, the Secretary then stated, was to make certain that "households are advised of the change and can adjust household [sic] budgets *accordingly*" (emphasis added). 43 Fed. Reg. 18896 (May 2, 1978). Naturally, for a poor family, the necessary adjustment to its budget will certainly differ if the proposed decrease is \$2.00 or \$50.00. Consequently, unless an individual notice informs a household of at least the amount of any impending reduction, the just-quoted contemporaneous interpretation of the Secretary is stripped of meaning, for it would be impossible for a family to budget in accord with an unknown factor. In view of the above, it can be seen that the Secretary's current reading of his regulations is inconsistent not only with their language, but also with his earlier pronouncements regarding them.

Nonetheless, in support of his current restrictive view of his regulations, the Secretary contends that notice need only inform a household that some change is going to occur, and then tell it where to look for further information (reply br. at 26). There are several problems with the Secretary's current viewpoint, aside from the fact that, as discussed above, it conflicts with his earlier position. First, it is inconsistent with the language of 7 C.F.R. § 273.12(e)(2)(ii) that a household's "benefits shall be continued at the former level" if the issue

being appealed is that its benefits were improperly computed.³ If, in order to discover a computational error, a household must wait until it has been reduced and then seek out and scour its case file to determine the basis for the reduction, it is difficult to discern how its benefits can "be continued at the former level." At best, those benefits could be reinstated, a concept envisioned neither by 7 C.F.R. § 273.12(e)(2)(ii) nor 7 U.S.C. § 2020(e)(10).

Second, such attempts to shift the burden of acquiring adequate notice onto program participants have been specifically rejected by numerous courts. In *Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974), the court noted that "[u]nder such a procedure only the aggressive receive their due process right to be advised of the reasons for the proposed action." The court in *David v. Heckler*, #79 C 2813 (E.D.N.Y. 7/11/84), slip op. at 32, reached exactly the same conclusion, noting additionally that "it is doubtful that the infuriating problem of gaining telephone access to, and satisfaction from, any bureaucracy has been solved . . ." *David*, slip op. at 33. And in *Malanson v. Wilson*, #79-116 (D. Vt. 8/12/80), slip op. at 12, the court rejected such a come-in-for-further-information approach because it "improperly places on the recipient a burden of acquiring notice whereas due process directs defendant to supply it. . . ." In the present case, both the statute and applicable regulations direct the defendants to supply notice, and the Secretary's invitation to households to go and rummage through their case files for information does not constitute an adequate substitute for that directive.

Finally, the record here indicates that calling for information about one's case, or even looking in one's file, would not result in finding any information of value. As noted in Parker's main brief (at 3), Ms. Johnson, Mr. Parker and Ms. Zades all called

³ The Secretary misreads his own regulation when he contends that § 273.12(e)(2)(ii) limits the availability of a fair hearing to those cases alleging a miscalculation of benefits (reply br. at 10 n.5). The regulation makes clear that a fair hearing is always available. It is continued benefits that are only available if a household alleges a computational error.

their caseworkers to no avail. Further, Ms. Johnson and Ms. Zades each won their subsequent hearings because their files did not contain sufficient information to explain the basis for the proposed reductions. Nor, unfortunately, are the experiences of these plaintiffs unique or even unusual. As the *amicus* brief of the National Anti-Hunger Coalition points out all too clearly (at 9 nn.6 and 7), inattention to clients caused by increasing caseloads and decreasing staff levels is becoming the norm, not the exception. In view of this, the Secretary's contention that it is sufficient to allow households to check their files to determine if they have been improperly treated is not only wrong as a matter of law, but also ineffective as a matter of fact.

Consequently, it can be seen that the Secretary's current reading of his regulations is inconsistent both with his predecessors' earlier statements and the language of those regulations themselves. Further, his limited view of the purpose of notice within the Food Stamp Program does not comport with that exhibited by Congress in amending 7 U.S.C. § 2020(e)(10) to add the specific provisions at issue here. In light of all of these factors, the Secretary's interpretation of the Act is not entitled to significant deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976); and *S.E.C. v. Sloan*, 436 U.S. 103, 118 (1978). Rather, the Court should exercise its authority as the final arbiter of issues of statutory construction, *N.L.R.B. v. Brown*, 380 U.S. 278, 291 (1965), and affirm the decision of the First Circuit that § 2020(e)(10) requires "meaningful advance notice" of the type of food stamp reductions at issue here.

POINT II

THE FIRST CIRCUIT CORRECTLY DETERMINED THAT THE CONSTITUTION REQUIRES MEANINGFUL ADVANCE NOTICE OF THE REDUCTIONS AT ISSUE HERE

In light of the plaintiffs' clear statutory entitlement to meaningful advance notice demonstrated in our main brief (at 22-30) and in Point I, *supra*, it is as inappropriate for this Court

to reach the respondents' constitutional issues as it was for the First Circuit to do so.⁶ Nonetheless, the constitutional conclusion drawn by the court of appeals, although unnecessary, was substantively correct. In his effort to attack the reasoning and decision of the First Circuit, the Secretary, although claiming no such intention, necessarily asks this Court to overrule its decision in *Goldberg*. Failing that, he suggests that *Mathews v. Eldridge*, 424 U.S. 319 (1976), be ignored and that

⁶ Both respondents argue that because the court of appeals reached its remedial conclusions within a constitutional context, it is therefore incumbent upon this Court to consider the constitutional issues in order to address the propriety or impropriety of the relief afforded. This contention has no merit. It was exactly the First Circuit's mistake that, having found a statutory violation, it looked to the Constitution rather than the violated statute for the appropriate remedy. The plaintiffs' Petition claims that they are statutorily, not constitutionally, entitled to the relief afforded by the district court. Despite the Secretary's implication to the contrary (reply br. at 8), it is perfectly appropriate for this Court to now address the statutory relief question even though the court of appeals did not do so. That is precisely what was done in *Califano v. Yamasaki*, 442 U.S. 682 (1979), where the lower court decisions never even discussed the statutory violation, much less the relief to be afforded as a result thereof.

Equally unpersuasive is the state respondent's claim that the constitutional issues must be reached because 7 U.S.C. § 2020(e)(10) was allegedly enacted in response to *Goldberg v. Kelly*, 397 U.S. 254 (1970) (reply br. at 13, 23-24). First, the factual premise of this argument is wrong. As pointed out in our main brief (at 25 n.14), only the first clause of § 2020(e)(10) was enacted in response to *Goldberg*. The second clause, upon which plaintiffs rely, was not added until six years later. Further, contrary to the state respondent's suggestion, it is not the rule of this Court that it may ignore the language of an act of Congress passed in response to an earlier constitutional decision of the Court, and continue to consider subsequent issues in the regulated area pursuant to the old constitutional, as opposed to the new statutory, standard. The case relied upon by the Commonwealth for this proposition actually states exactly the opposite conclusion. *Arkansas Electric Co-op Corp. v. Arkansas Public Commission*, ___ U.S. ___, 103 S. Ct. 1905, 1909-10 (1983).

the notice issued here be found constitutionally sufficient. There is neither legal nor logical support for either of these approaches.

In arguing that no notice at all is due when reductions or terminations are undertaken to effectuate statutory mandates, the Secretary continues to confuse the concepts of substantive and procedural due process, and fails to recognize that only the latter is at issue here. This failure to grasp the actual issue is perhaps best demonstrated on page 19 of the Secretary's reply brief, where he cites *Richardson v. Belcher*, 404 U.S. 78, 81 (1971), for the proposition that "due process hearing rights 'cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.'" *Richardson* says no such thing. The very sentence that is misleadingly quoted by the Secretary starts with the words: "But there is no controversy over procedure in the present case, . . ." Rather, the sentence continues, it is the "analogy . . . between social welfare and 'property'" that cannot be stretched to impose a constitutional limitation. In its excellent discussion of the Secretary's contention that the purportedly correct reduction of a substantive entitlement strips one of his or her procedural rights, the First Circuit recognized that adoption of such a position inexorably leads to the conclusion that virtually no one will ever get notice of any reduction [PA 12-14].⁷

Rather, the court of appeals correctly concluded that notice and an opportunity to contest would only be unnecessary where an entire program was terminated, for then there would be no individual factual underpinnings involved. This, contrary to the Secretary's contention (reply br. at 19), is the import of

⁷ The Secretary offers no response to this point. Nor does he meaningfully reply to plaintiffs' claim (br. at 50) that his theory would also deprive incorrectly reduced households of a hearing, as well as notice. The Secretary baldly states (reply brief at 19-20) that no such result would follow, but suggests absolutely no constitutional basis upon which a household with no protected property interest could demand to be heard to protest the "loss" of that nonexistent interest.

Justice Blackmun's concurring opinion in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 798 (1980), where it was stated that:

. . . the property of a recipient of public benefits must be limited, as a general rule, by the governmental power to remove, *through prescribed procedures*, the underlying source of those benefits. (emphasis added)

The emphasized language above highlights the problem with the Secretary's analysis. It is not Congress' decision to reduce the substantive benefit that is challenged here; it is the adequacy of the procedures utilized by the Department of Public Welfare to implement that reduction. The Secretary's attempt to blur the distinction between these two issues in order to accomplish a major restriction of the process due vulnerable participants in this nation's various benefit programs is neither analytically helpful nor previously untested. In fact, numerous courts have explicitly rejected the argument, and easily distinguished the cases, here proffered by the federal government. They have found that if application of a new provision of law entails consideration of underlying individual facts, "the right to meaningful notice and an opportunity to contest attach. *Cardinale v. Mathews*, 399 F. Supp. 1163, 1172 (D.D.C. 1975); *Budnicki v. Beal*, 450 F. Supp. 546, 555 (E.D.Pa. 1978). See also, *Eder v. Beal*, 609 F.2d 695, 701-702 (3d Cir. 1979), as well as cases cited in our main brief at 58-59. Consequently, the Secretary's attempt to have this Court overrule the aspect of *Goldberg* (397 U.S. at 268) that requires procedural protection against "incorrect or misleading factual premises" and

* The individual facts at issue here for each victim of the proposed reduction were whether they actually had any earned income at all to be counted (the named plaintiff below, Karen Foggs, and the family revealed in the record at JA 44 did not) and, if so, the accuracy of the amount of earned income being counted by the Department. Only by knowing the latter figure could a household determine whether the amount of the change in its allotment was likely to be correct; for if the earned income figure was not accurate, any pre-existing error in the grant calculation would be magnified by the impending recalculation, thus resulting in an additional incorrect reduction of the household's benefit.

"misapplication of rules or policies to the facts" of a case should, once again, be rejected.

The respondents' fall-back position appears to be that if the Court is not willing to overrule *Goldberg*, it should at least ignore the analytical formula set forth in *Eldridge*, which, we are told, should not be applied in notice cases (Secretary's reply brief at 24 n.19). This is so, it is argued, because *Eldridge* is "essentially a cost-benefit standard" (*ibid.*) and the provision of notice will often entail "no injury to governmental interests" (Secretary's main brief at 36 n.31). The "undesirable" result of these two facts is apparently that since it frequently will cost nothing extra to provide adequate notice, such notice will almost always be required. Seeking to avoid such an untoward result, the respondents would seemingly have this Court apply *Eldridge* where the administrative burden involved militates against further procedural protections, but not where the absence of any burden suggests that further useful procedures should be employed. This contention is nothing short of a result-oriented analysis designed to ensure that procedural protections beyond those chosen by administrators in a given case are never required. But the *Eldridge* test cannot be so selectively embraced and discarded. If the individual interest at stake is significant and there is a substantial risk of error involved in accomplishing a given change,⁹ it is

⁹The Secretary's continued *post facto* attempts to belittle the errors that occurred in this case are unavailing. His statement that there is no support in the record for the plaintiffs' claim that the minimum error rate was actually higher than found below because of the inclusion of some incorrectly provided data is simply wrong (reply br. at 21). A document submitted by the Department of Public Welfare itself, AP-ADM 81-79 [JA 62], unequivocally establishes that no household listed under error code B (the improperly considered data below) experienced any reduction in its benefits. Therefore, plaintiffs' demonstration that the minimum error rate was actually higher than projected (br. at 54) is entirely accurate.

Further, the Secretary resorts to a tautology in his attempt to explain away the family with no earned income [JA 44] that was nonetheless terminated from the program. Because they had no

exactly the point of *Eldridge* that additional useful procedures are mandated unless it would impose an unacceptable burden upon the government to provide them. As no such burden was found or ever claimed in this case, *Eldridge* dictates that the provision of adequate notice ordered below was appropriate.

In a final attempt to undermine the decision of the First Circuit, the Secretary proffers an apparently obligatory "floodgates" argument. If due process requires meaningful notice here, he states, then such notice would be required every time the government issues a check, provides a benefit or makes a calculation (reply br. at 25). This contention ignores the balancing test set forth in *Eldridge*, as well as this Court's holding in *Parratt v. Taylor*, 451 U.S. 527 (1981). By definition, *accidental* deprivations of property by the government cannot be predicted, and therefore advance notice of them is not possible, much less required. This reality, however, does not lead to the conclusion that no notice is due when the government *intends* to deprive one of property, and predictab-

earned income, he argues (reply br. at 22 n.17), they could not have been terminated because of the earned income disregard. Only by assuming the conclusion in the premise does this "argument" make sense. In logic this is known as a tautology; in law it is called obfuscation. In fact that family was incorrectly terminated because of the misapplication of the earned income disregard change. The separate minimum benefit error could have had no effect. If the household was correctly receiving \$10.00 per month before the proposed change at issue here, then, pursuant to the minimum benefit rule, it was by definition entitled to some amount of benefits between \$1.00 and \$10.00 per month. If, prior to the proposed change, the family had been eligible for no benefits, it simply would not have been on the program. Therefore, if, as the Secretary argues, the household's reduction resulted from the Department's failure to reinstate the minimum benefit rule following the earned income change, the household's allotment would have been listed as some number under \$10.00 but, by definition, over zero. The fact that the family was indeed terminated demonstrates that, by purportedly applying the new earned income disregard to a family listed as having no earned income, the Department somehow managed to reduce that family's grant.

ly will make mistakes in doing so. It is only the latter situation that was addressed by the courts below, and it is only that situation that would be affected by the decision of this Court.

Consequently, it can be seen that none of the arguments raised by the respondents to attack the decision of the First Circuit can bear scrutiny. As such, were this Court to reach the constitutional question, the decisions below should be affirmed.

POINT III

THE FIRST CIRCUIT ERRED IN REVERSING THE RELIEF AFFORDED BY THE DISTRICT COURT

Following a two day trial, and based upon over one-hundred findings of fact and conclusions of law, the district court entered an order directing the state defendant to include in future food stamp reduction notices sufficient information to make them useful to their recipients [PA 103-104]. In addition, the state defendant was instructed to draft regulations, subject to court review, regarding the legibility and comprehensibility of those notices [PA 102]. Finally, the defendants were ordered to restore to the plaintiff class those benefits which had been withheld in violation of the provisions of 7 U.S.C. § 2020(e)(10) [PA 101]. Because this relief did not constitute an abuse of the district court's broad equitable discretion, it was improper for the First Circuit to substitute its remedial preferences for those of the trial court.

A. The Prospective Injunctive Relief

Only the state defendant takes issue with the district court's decree concerning the contents of future notices. He argues that because he is a governmental defendant, only a declaration, and not an injunction, is necessary to ensure his future compliance (reply br. at 48-49). He nonetheless is forced to admit that a recently issued mass change notice prompted by this year's social security cost-of-living increases did not provide "sufficient information . . . to determine whether the individual who received that notice was in fact erroneously deprived of benefits" (reply br. at 52-53 n.35). It is just such

information, however, that both the district court and court of appeals declared had to be contained in future notices of food stamp reductions [PA 102-103, ¶ 4; PA 21]. Whatever the ultimate wisdom of the First Circuit's decision, the Commissioner did not seek nor obtain a stay of its mandate. Rather, he merely, and admittedly, ignored it. This Court has held that such conduct is not to be condoned. *See Walker v. City of Birmingham*, 388 U.S. 307, 320-321 (1967). While *Walker* involved the violation of an injunction, not a declaration, pending appeal, that is a distinction that the Commissioner contends is immaterial with regard to his compliance. Unfortunately, he has just demonstrated that it is not, and has thereby confirmed the propriety, if not necessity, of the injunction issued by the district court.

With respect to the legibility and comprehensibility issue, the defendants first mischaracterize the scope of the district court's order and then argue that it was properly reversed because the district court "assumed an unwarranted degree of judicial control over the rulemaking result."¹⁰ Fed. reply br. at 40; state reply br. at 55. The Commissioner further protests that the mandate that he develop standards for the comprehensibility of future notices would subject him to a never-ending threat of contempt (reply br. at 49-50). However, inspection of the district court's order demonstrates that neither contention is correct.

By instructing the Department to develop its own plan (in the form of draft regulations) to ensure the future comprehensibility of notices, the court afforded the state defendant the

¹⁰ The Secretary again assumes his conclusion without any analysis. The state defendant goes further and misstates, without reference to the record, the holding on the comprehensibility and legibility issue. Contrary to the Commissioner's assertion, the district court never "concluded that Due Process requires . . . notices to be printed no smaller than eight-point type, with a mixture of upper and lower case letters, and written for a person with a fifth-sixth grade reading capacity" (reply br. at 44 n.31). Nor did the court dictate the manner in which the Department by regulation might ensure that future notices would be legible and comprehensible.

widest possible latitude that was consistent with its obligation to protect the plaintiff class. It is the Department that would decide the content of the draft regulations. Upon approval, those regulations would presumably be promulgated, and at that point all court involvement would cease. Any future violations by the Department would be of its own regulations, not of the court's order. Thus, far from setting up a system in which it would assume the role of an ongoing monitor, the district court merely ordered the Department, in effect, to supervise its own future behavior by issuing regulations on the contested subject of comprehensibility. Hence, the prospective aspects of the remedial order were well within the authority of the court, and it was therefore improper for the First Circuit to reverse them.¹¹

B. Restoration Of Wrongfully Withheld Benefits

As plaintiffs established in their main brief (at 38), the Food Stamp Program envisions that households will continue to receive their prior level of benefits during the implementation of any reduction or termination of those benefits. 7 U.S.C. § 2020(e)(10). Both defendants attempt to refute this proposition by noting that 7 C.F.R. § 273.15(k)(1) authorizes the recovery of payments made during the pendency of an unsuccessful appeal (federal reply br. at 33; state reply br. at 33). While there appears to be no specific statutory authority for this regulatory provision, even the regulation provides for recovery only between the originally noticed effective date of the action and the date of the adverse hearing decision. Neither defendant has responded to the fact that every single household that is properly provided with advance notice of an impending reduction or termination by definition receives a substantively incorrect, but statutorily authorized, level of bene-

¹¹ There is no merit to the defendants' suggestion that an amendment to 7 U.S.C. § 2020(d), Pub. L. 97-253, § 166 (1982), which precluded the Secretary's prior approval of certain administrative documents, somehow diminished the remedial power of the district court. Nothing in the legislation evinces such an intention. Indeed, Congress explicitly excepted from the amendment any materials which "conflict with the rights . . . to which a household is entitled."

fits during the advance notice period. 36 Fed. Reg. 20146 (October 16, 1971).

Indeed, when not embroiled in litigation, the Secretary himself recognizes that the previous level of a household's benefits may in fact remain the benefits to which it is entitled pending implementation of even a mass change. The food stamp regulations, for example, allow a state 120 days to implement recurring mass change reductions due to cost-of-living increases in social security and SSI payments (the "more common type" of mass change according to the Secretary. Reply br. at 18 n.12). 7 C.F.R. § 273.12(e)(3)(ii). Further, § 272.1(g)(16)(ii) allowed states to delay implementation of the Congressionally mandated reduction in the program's resource limits until the expiration of a household's certification period. This of course resulted in families who no longer qualified for the program receiving benefits for up to a year during implementation of the change.

In enacting the OBRA amendments to the Food Stamp Act, Congress did not indicate that it wished to alter this normal pattern of implementation. It said nothing to induce the Secretary's sudden concern with instant applicability. Rather, Congress explicitly recognized that the amendments would not be self-effectuating. The legislation specifically provided that any timetable for applying the program changes should be established "taking into account the need for orderly implementation."¹² Pub. L. 97-35, § 117 (1981).

The Secretary's inconsistency in this regard has been judicially recognized. In *Levesque v. Block*, 723 F.2d 175,

¹² This Congressional concern for orderly implementation is reflected in 7 U.S.C. § 2013(c), which requires that program rules be issued in accord with the Administrative Procedure Act, and in § 2020(e)(10), which sets forth how any of those rules that require a reduction or termination of benefits, once issued, are to be implemented with regard to a given household.

Whether there would be a constitutional problem if, as the Secretary hypothesizes (reply br. at 18), Congress specifically mandated the

186-187 (1st Cir. 1983), the court rejected the argument that Congress, even by specifying the effective date of certain program amendments, made those program changes self-implementing. Noting that the Secretary's new-found position conflicted with his prior practice, the Court held that participants' benefits could not be reduced based upon the amendments until properly implemented. The Court then ordered that benefits reduced prior to proper implementation had to be retroactively restored.¹³ *Levesque*, 723 F.2d at 189.

Thus, § 2023(b) simply cannot be read to exclude from its coverage benefit reductions effectuated prior to lawful implementation. As plaintiffs demonstrated in their main brief at 37-43, not only would such a construction conflict with the basic structure of the program, it would also do violence to the plain language of the statute. Nonetheless, both defendants argue that the term "wrongfully withheld" in § 2023(b) should be found to have exactly the same meaning as the phrase "wrongfully denied or terminated" found in § 2020(e)(11) of the Act. This contention, however, overlooks the fact that "[s]ince these terms are used in similar context within the same [act], it is logical to assume that Congress intended that the terms have different and distinct meanings." *Smith v. Ithaca Corp.*, 612 F.2d 215, 222 (5th Cir. 1980); *Complaint of American Export Lines*, 73 F.R.D. 454, 457 (S.D.N.Y. 1977); *Hoffman v. Joint Council of Teamsters*, 230 F. Supp. 684, 691 (N.D. Cal. 1962). Given this, it is clear that § 2023(b) was intended to be the broader of the two provisions.

immediate implementation of a program change without notice to the affected households is a question not raised by this case. In fact, it is an issue unlikely to be raised in any case, since such a mandate, whether or not constitutionally permissible, would almost certainly prove administratively impossible.

¹³ Although the *Levesque* decision did not specifically refer to 7 U.S.C. § 2023(b), the district court order, which was affirmed with minor modification, specifically relied upon § 2023(b) for the restitution remedy. *Levesque v. Block*, Civ. Action No. C 82-437-L (D.N.H. orders entered 3/31/83 and 4/28/83).

Further textual support for this conclusion is found in the final phrase of § 2023(b), in which Congress indicates that a "possible loss" can trigger the restoration remedy (emphasis added). Significantly, the parallel clause of § 2020(e)(11), while otherwise using virtually identical language, does not contain the adjective "possible." Consequently, to read the two sections co-extensively is to render superfluous the use of the word "possible" in § 2023(b), a result that conflicts with well-settled rules of statutory construction. *U.S. v. Menasche*, 348 U.S. 528, 538-539 (1955); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-339 (1979). In light of this, it is clear that the phrase "wrongfully withheld" in § 2023(b) encompasses the reductions and terminations at issue here.

The Secretary's effort to distinguish *Sampson v. Murray*, 415 U.S. 61 (1974), which supports the above conclusion, is unavailing. His argument is premised on the fact that the civil service regulations involved there specifically allowed for the appeal of alleged procedural violations (reply br. at 34). This is no distinction at all. Not only the relevant food stamp regulation, but the Act itself, grant the right to a fair hearing to "any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program. . . ." 7 U.S.C. § 2020(e)(10); 7 C.F.R. § 273.15(a). Pursuant to these provisions, food stamp participants regularly appeal proposed actions because they have, *e.g.*, received inadequate notice, and in Massachusetts at least, the Department of Public Welfare regularly upholds such "procedural" challenges by reinstating benefits until proper notice is issued. *See*, annexed hereto as Appendix A, Department Fair Hearing Appeal #104885 (benefits reinstated solely because no notice of reduction sent to household); Appeal #111946 (benefits reinstated solely because English language notice sent to a Spanish-speaking household); and Appeal #61835 (benefits restored because notice of termination did not include reason and citation supporting the action). Consequently, the *Sampson* case cannot be distinguished as the Secretary has suggested.

Further, *Sampson* is not the sole authority for finding that benefits withdrawn without proper notice are wrongfully withheld. The decision in *Chavis v. Heckler*, 577 F. Supp. 201 (D.D.C. 1983), stands for the same proposition. There, after analyzing the analogous SSI notice and hearing requirements, the court held that those provisions create a continuing entitlement to benefits until a recipient is provided notice and an opportunity to be heard regarding the basis for any termination. While the court agreed with the Secretary that Mr. Chavis was not in fact disabled during the relevant period, it nonetheless found that Congress intended benefits to be paid until a proper termination was accomplished. It therefore specifically held that the benefits terminated prior to the receipt of notice had been "wrongfully withheld" and ordered them restored. *Chavis* at 206.

Hence, it can be seen that the defendants' attempts to restrict the scope of § 2023(b) are unpersuasive. However, even if one were to ignore that section entirely, the district court's restitution order would nonetheless constitute an appropriate exercise of its equitable jurisdiction to effectuate the requirements of § 2020(e)(10). The Secretary's reliance upon *Schweiker v. Hansen*, 450 U.S. 785 (1981) (*per curiam*), and *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), to dispute this contention is misplaced. In both those cases, individuals relied to their detriment upon information provided by agency officials which proved to be an inaccurate statement of the existing law. Reasoning that misstatements by government employees could not alter the statutory obligations of the United States, the Court refused to estop the government. However, in the present case, it is the defendants, not the plaintiffs, who are seeking to circumvent the procedures defined by Congress for reducing or terminating food stamp benefits. In these circumstances, the principles enunciated in *Hansen* and *Merrill* support the restoration of benefits reduced or terminated in contravention of the terms set out in § 2020(e)(10), even if in accomplishing those reductions the Department was merely relying upon the federal defendant's misreading of the Act.

Finally, for the first time in this entire case, the Secretary suggests that any restoration of benefits is precluded by the Eleventh Amendment and principles of sovereign immunity.¹⁴ However, this position is really nothing more than a restatement of his earlier argument that the Food Stamp Act does not authorize restoration of these benefits. Each contention is premised upon the assumption that neither respondent "has consented to be sued for retroactive benefits in excess of those authorized by Congress" (fed. reply brief at 30). However, what benefits have been authorized by Congress in §§ 2020(e)(10) and 2023(b) is precisely the issue in this case. Since each defendant readily admits that he is bound to restore benefits authorized by the Act (state reply br. at 35-36 n.23; federal reply br. at 39), applying sovereign immunity and Eleventh Amendment labels to the problem adds nothing in the way of helpful analysis.

The cases relied upon the Secretary in support of his sovereign immunity argument best demonstrate the above point. *United States v. Testan*, 424 U.S. 392 (1976), was an action under the Classification Act, which this Court found did not provide for the payment of any specific benefits by the federal government. *Testan*, 424 U.S. at 401-402. In contrast, this Court has recently noted that sovereign immunity does not attach to "a suit 'for money improperly exacted or retained' or a claim based upon a regulation that promises money." *Army and Air Force Exchange Services v. Sheehan*, 456 U.S. 728, 739 n.11 (1982) (quoting *Testan* at 401-402); see also, *United States v. Clark*, 445 U.S. 23, 34 n.11 (1980), *United States v. Mitchell*, ___ U.S. ___, 103 S. Ct. 2961, 2972-73 (1983).

Because § 2020(e)(10) of the Food Stamp Act promises that households "shall continue to participate and receive benefits" (emphasis added) at their prior level pending proper imple-

¹⁴ Before the First Circuit, the Secretary argued that it would be inappropriate for the court to reach the Eleventh Amendment issue because it is by no means certain that the award would ever be paid by the state. The Department, which advanced an Eleventh Amendment argument below, has now abandoned it.

mentation of a change in those benefits, the current case properly falls within the ambit of the *Sheehan* and *Mitchell* cases, not within that of *Testan*. The plaintiffs are merely seeking restitution of what Congress has promised them, not compensatory damages for the violation of their procedural due process rights.¹⁵ This exact analysis was applied by the court in *Chavis v. Heckler*, 577 F. Supp. at 205-206, in rejecting the federal government's claim that sovereign immunity barred the restoration of disability benefits that had been terminated without adequate notice. Thus, sovereign immunity does not bar the relief granted by the district court.

Nor does the Secretary's Eleventh Amendment argument fare any better. The cost of food stamp benefits, as the First Circuit noted and the Secretary admits (reply br. at 28 n.23), is borne by the federal government, not the states [PA 36 n.6]. 7 U.S.C. § 2013(a). The possibility that the Secretary might attempt to recover the cost of such benefits from the state in a separate administrative proceeding does not insinuate the Eleventh Amendment into this case. *Edelman v. Jordan*, 415 U.S. 651, 665 (1974), upon which the Secretary relies, held that, absent a waiver, the Eleventh Amendment precludes retroactive relief when the award must "inevitably come from the general revenues of the State . . ." (emphasis added). As the Secretary has himself conceded that he does not even know if he would seek to recover from Massachusetts the value of the restored benefits (reply br. at 28-29 n.23), it is certainly far from inevitable that the cost of such benefits will ever be charged to the state treasury. Consequently, even leaving aside the question of what benefits are authorized by the Food Stamp Act, the Eleventh Amendment would not present a problem in this case.

¹⁵ It is this distinction that renders *Carey v. Piphus*, 435 U.S. 247 (1978), inapposite. Because neither science nor philosophy has yet discovered a way to restore lost time, the plaintiffs in *Carey* were by definition seeking damages, not restitution of something they claimed had been wrongfully removed.

In light of the above discussion, it can be seen that the defendants have offered no persuasive reasons why the relief afforded by the district court should not be reinstated.

CONCLUSION

For the reasons set forth above and in plaintiffs' main brief, the judgment of the court of appeals should be affirmed on the merits, but the relief entered by the district court should be reinstated.

Respectfully submitted,

STEVEN A. HITOV
(Counsel of Record)

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Counsel for Parker, et al.

APPENDIX

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE

APPEAL DECISION—Approved

CSA: PITTSFIELD

APPEAL NO. 104885

CATEGORY: FOOD STAMPS

NAME: DELETED

ADDRESS: Pittsfield, MA 01201

DECISION DATE: SEP 12 1983

DATES: Filing-8/22/83, Hearing-9/8/83

JURISDICTION:

The Department reduced the household's August Food Stamp benefits without providing the household with advance notice.

The appellant filed this appeal on 8/22/83, and, therefore, it is timely (106 CMR 367.100). (Exhibit A).

Department action which effects participation in the Food Stamp program is grounds for appeal.

The reduction of Food Stamp benefits is grounds for appeal (106 CMR 367.025).

ACTION BY DEPARTMENT:

The Department reduced the appellant's Food Stamp benefits without providing the appellant advance notice of adverse action.

ISSUE:

Was the Department required to provide advance notice before decreasing the appellant's Food Stamp benefits?

SUMMARY OF EVIDENCE:

The Department representative testified that a review of the appellant's case was conducted in June and that there was a change in the appellant's shelter expenses. The representative further testified that a notice to the recipient was not gener-

ated because the computer did not accept a shelter change with a notice of review.

The representative submitted into evidence a copy of "Field Operations Message" dated August 8, 1983 (Exhibit B) and AP-83-26 (Exhibit C).

The appellant stated she did not learn that her Food Stamp benefits were to be reduced until receiving reduced benefits in August.

The appellant's representative submitted into evidence copies of Department regulation 106 CMR 364.860, 366.200 and 210 and federal regulation Title 7 Section 273.12(c)(2) and Section 273.13.

FINDINGS OF FACT:

In June of 1982 the Department determined that the appellant was no longer entitled to a heating standard utility allowance in accordance with revised Food Stamp regulations (not disputed). On or about July 1, 1983 the Department submitted a Food Stamp transaction on the same turn-around document (TD) with a "Notice of Review."

Because the Monthly Reporting System (MRS) does not generate a notice to the recipient when a Food Stamp transaction is submitted on the same T.D. with a "Notice of Review," the system did not send the appellant notification (See Exhibit B).

The appellant received reduced allotments for August and September.

CONCLUSIONS OF LAW:

Department Food Stamp regulations provide that before taking action to reduce or terminate a household's benefits during the certification period, the worker shall provide the household with advance notice of adverse action. See 106 CMR 366.200.

In certain circumstances benefits may be terminated or decreased without providing advance notice. See 106 CMR 366.210.

The exceptions to advance notice requirements set forth in section 366.210, are not applicable in the appellant's case.

The referee concludes that the appellant was/is entitled to a "Notice of Adverse Action" and the right to a prereduction hearing prior to reducing her benefits.

The appellant is entitled to notification containing the information as set forth in Department regulation 106 CMR 364.860.

The referee concludes that the Department incorrectly failed to provide proper notice prior to reducing the appellant's benefits and that this procedural defect requires that the Department reinstate the appellant's prior level of benefits and restore lost benefits. The Department may then provide notice of adverse action in accordance with Department regulation prior to taking action to reduce benefits.

The appeal is approved.

ACTION FOR CSAO:

Reinstate prior level of benefits. Restore benefits lost for months of August and September. Proceed to take new action to reduce with adequate prior notice.

/s/ Edward J. Collins
EDWARD J. COLLINS
WELFARE APPEALS REFEREE

copy: Janice Broderick, WMLS
Pittsfield, MA

**MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE
APPEAL 111946**

JURISDICTION:

An English language notice dated 2/14/84 was sent to the appellant stating that the Department was planning to terminate her AFDC benefits because: The child(ren) is not deprived of parental support—106 CMR 303.300. Your Food Stamps will end on 3/4/84 because you no longer meet the eligibility requirements of the Food Stamp Program—106 CMR 366.100 (Exhibit A).

The appellant filed this appeal on 2/24/84; therefore, it is timely (106 CMR 343.140(B), 367.100), (Exhibit A).

The termination of assistance is grounds for appeal (106 CMR 343.230(A), 367.025).

ACTION:

The Department terminated the appellant's AFDC and Food Stamp benefits on 3/4/84 (See Exhibit A).

ISSUE:

Whether the appellant should have been sent a Spanish language notice of termination.

SUMMARY OF EVIDENCE:

The Department representative testified that the appellant's initial application for AFDC of 2/14/82 showed that she spoke no English and that she was "Spanish."

FINDINGS OF FACT:

The record shows and I so find that the appellant is Spanish speaking and that the Department knew, and had reason to know, that she is Spanish speaking (See Exhibit B) when it sent her a notice of termination employing the English language (Exhibit A).

CONCLUSIONS OF LAW:

Under the Stipulation in *Casul v. Minter*, the Department is obligated to send Spanish language notices of reduction, suspension and termination to clients whom it knows, or has reason to know, are Spanish speaking. The Stipulation further provides that when the Department sends an English language notice to such a client it is the equivalent of the client's having received no notice at all.

Since I have found that the appellant is Spanish speaking and that the Department, while knowing she is Spanish speaking, sent her an English language notice of termination, I conclude in accordance with the Stipulation, that the appellant's receipt of the English language notice is the equivalent of her receiving no notice at all.

Therefore, the Department's action to terminate the appellant's AFDC and Food Stamp benefits on the basis of the information contained in its English language notice is overturned. This appeal is, hereby, approved.

ACTION FOR DEPARTMENT:

CSAO—Reinstate the appellant's AFDC and Food Stamp benefits effective 3/4/84.

/s/ Leo Jeghelian
LEO JEGHELIAN
WELFARE APPEALS REFEREE

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE**APPEAL DECISION:** Approved

WSO: 285-Springfield

RO: Springfield

CAN: 263

APPEAL NO.: 61835

CATEGORY: 02-AFDC

NAME: DELETED

ADDRESS: Springfield, Ma.

DATES: Filing-10/29/80, Hearing 11/24/80, 11/17/80

JURISDICTION:

Notice dated 10/6/80 was sent to the appellant stating the Department was planning to reduce her AFDC and Food Stamp assistance. Manual Citation: 304.320 (Exhibit A). The reduction of assistance is grounds for appeal and since this appeal was filed on 10/29/80 it is, therefore, timely 106 CMR 343.140 and 343.230.

ACTION BY DEPARTMENT:

The Department has reduced the appellant's AFDC grant.

ISSUES:

Whether the notice of reduction is proper in that it affords due process and complies with the regulations of the Department.

SUMMARY OF EVIDENCE:

The Department representative testified the basis for the reduction is the removal of one of appellant's son from the AFDC grant. The representative explained appellant's son was attending the Skill Center, came into the WSO requesting to be removed and informed the representative it was okay with appellant, therefore she sent the NFL #10.

The appellant stated through her legal advocate that; 1) The notice of adverse action was insufficient because it failed to state a reason for the action; and 2) The action was improper

because the Department failed to follow their regulations in this matter. Appellant testified she came in after the check was reduced and asked for an explanation.

Appellant's legal advocate asked that the record be held open for submission of Exhibit B, 45 CFR & 205.10 (a)(1)(ii) and (a)(4)(i), and Exhibit C, Goldberg v. Kelly, 90 S.Ct. 1011, (1970). The request was granted until November 24, 1980 at which time the record closed as Exhibits B & C had been submitted.

FINDINGS OF FACT:

The NFL #10 sent to the appellant is lacking a Summary of Evidence relative to the AFDC reduction and the Food Stamp reduction. The Manual Citation supporting the Food Stamp reduction is missing as well.

The Department did not discuss the reduction with the appellant prior to the NFL #10 but relied upon the statement made by appellant's son.

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE**CONCLUSIONS OF LAW:**

106 CMR 302.500 sets forth the information a notification of proposed action must include. Among the information required are: a) The reasons for the proposed action and b) The citation to the regulations supporting the action. It has been found that the reason and citation were missing, the notice is therefore insufficient, failing to satisfy due process requirements in that it does not comply with Department regulations to insure due process.

"Except in specified circumstances . . . membership in the assistance unit is optional. The applicant or recipient must be informed of the advantages and disadvantages of the alternatives before she makes a decision." 106 CMR 304.320. Appellant was not given the opportunity to weigh the pro and con of having her son removed from the grant through discussion with the Department. Discussion with the appellant in this instance after the reduction has taken effect does not negate the Department's obligation prior to the proposed action. The Department's failure to comply with 106 CMR 304.320 and 302.500 has resulted in a loss of both AFDC and Food Stamp benefits to the appellant. The appeal is approved.

ACTION FOR WSO:

Restore benefits lost from the date of reduction to the date of the implementation of this decision. 106 CMR 343.620. The Department should discuss the advantages and disadvantages of appellant's son remaining a member in the assistance unit with appellant as soon as possible.

/s/ Lucille Myles

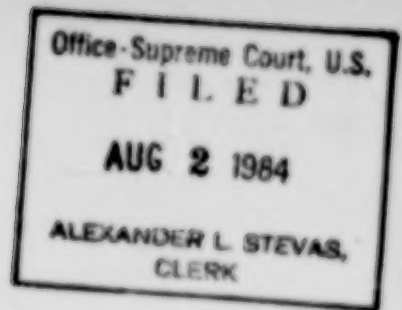
LUCILLE MYLES

WELFARE APPEALS REFEREE

copy: Henry Korman, Esq.
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145 State Street
Springfield, Ma. 01105

AMICUS CURIAE

BRIEF



4
NO. 83-1660

**IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1983**

**CHARLES M. ATKINS, Commissioner of
the Massachusetts Department of
Public Welfare,**

Petitioner,

v.

GILL PARKER, et al.

Respondents.

**BRIEF OF AMICUS CURIAE STATE OF WASHINGTON
IN SUPPORT OF PETITIONER
CHARLES M. ATKINS**

**KENNETH O. EIKENBERRY
Attorney General**

**CHARLES F. MURPHY
Assistant Attorney General**

**Temple of Justice
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Olympia, WA 98504
(206) 459-6558**

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GILL PARKER, et al.

Respondents.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON
IN SUPPORT OF PETITIONER
CHARLES M. ATKINS

I. QUESTIONS PRESENTED

1. Whether a general notice sent to more than 16,000 food stamp households, informing them of federal statutory changes in the earned income deduction and providing them with a detailed

explanation of their right to appeal any reduction or termination of benefits, satisfied the requirements of the Due Process Clause.

2. Whether the Court of Appeals erred in refusing to review independently findings of fact which determined the constitutional question.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

This brief is respectfully filed on behalf of the State of Washington at the request of the Department of Social and Health Services.

The State of Washington, like the State of Massachusetts, participates in the federal food stamp program. 7 U.S.C.S. § 2011-2029. In 1981 Washington, like Massachusetts, reduced recipient household benefits pursuant to federal statutory changes. Omnibus

Budget Reconciliation Act (OBRA), 95 Stat. 357 (1981). Like Massachusetts, Washington sent out mass notices to all affected households as required by the directives of federal regulations regarding notice of mass changes. 7 C.F.R. § 273.12(e)(2)(ii) (1981). The notices sent out by Washington were substantively identical with those sent out by Massachusetts. Thus, the Court's ruling in the instant case will likely be determinative as to the constitutionality of those notices sent to food stamp recipients by the State of Washington.

III. INTRODUCTION AND SUMMARY OF ARGUMENT

Washington State's participation is voluntary. States are not compelled to make use of the program. Jay v. United States Department of Agriculture, 441 F.2d 574 (5th Cir. 1971)

Washington, in essence, contracts with the federal government and, in exchange for federal funding of the food stamp program, the state administers the program locally. In so contracting, Washington must comply with both federal congressional enactments and federal administrative regulations promulgated by the Department of Agriculture. Peppers v. McKenna, 81 F.R.D. 361, 364 (1977).

In 1981 Congress passed the Omnibus Budget Reconciliation Act (OBRA), supra. That Act, among other things, reduced the level of the earned income deduction from 20 percent to 18 percent. Pub. L. No. 97-35, § 106. The earned income deduction is one factor which establishes whether or not a recipient household is eligible for food stamps and, if

so, the extent of benefits that will be received. 7 C.F.R. § 273.9(d)(2) (1981).¹

When mass changes occur, federal regulations require that notification be sent to the recipient households. 7 C.F.R. § 273.12(e) (1981) provides:

Certain changes are initiated by the State or Federal government which may affect the entire caseload or significant portions of the caseload. These changes include adjustments to the income eligibility standards, the shelter and dependent care deductions, the Thrifty Food Plan, and the standard deduction. . . .

A notice of adverse action is not required when a household's food stamp benefits are

¹ Other deductions include, for example, the excess medical deduction, (d)(3); dependent care, (d)(4); shelter costs, (d)(5); and the standard utility allowance, (d)(b).

reduced or terminated as a result of a mass change in the public assistant grant. However, State agencies shall send individual notices to households to inform them of the change.

Because the OBRA Amendments changed the standard deduction from 20 percent to 18 percent, and because "significant portions of the caseload" were affected,² the Secretary of Agriculture authorized "mass change" notices. 46 Fed. Reg. 44712, 44722 (September 4, 1981).

The Court of Appeals' opinion in Foggs v. Block, 722 F.2d 933 (1st Cir. 1983), agreed that no notice of "adverse action" was required but also held that recipient households "were entitled to meaningful advance notice." Foggs v.

² In Washington 20,000 recipient households had a reduction in benefits.

Block, at 940. That Court, in affirming the district court's decision, found that the Massachusetts' notice was difficult to read, relatively difficult to comprehend, ambiguous, and lacked specific information necessary to allow recipients to determine if a calculation error had been made. Foggs v. Block, at 938.

The Court of Appeals thus held that the Massachusetts' notice must be made more readable and easier to comprehend, and that specific information pertaining to each individual household must be placed on the notice sent to that particular household.

The State of Washington urges the Court to overturn the decision of the Court of Appeals for the following reasons:

1. The Court of Appeals inappropriately applied the Mathews v. Eldridge balancing test in a rule-making, nonadjudicatory, administrative situation.

2. The administrative burden of sending mass change notices containing particular financial information to individual household recipients exceeds the benefit gained by individual recipients, and increases the likelihood of error and confusion.

3. The Court of Appeals engaged in judicial legislation by requiring notices of mass changes to contain specific financial information pertaining to each individual recipient household where federal regulations and statutes do not require such individualized notices.

IV. ARGUMENTS

A. Mathews Balancing Test.

The district court applied the Mathews v. Eldridge, 424 U.S. 319 (1976) balancing test to determine whether the state's notice provisions satisfied procedural due process. The Court of Appeals upheld the district court's application of the test, saying:

In concluding that the December notice failed to provide constitutionally adequate notice, the district court applied the appropriate legal standard, the Mathews balancing test.

Foggs v. Block, at 938.

This ruling is inconsistent with other courts faced with the issue of notice and hearing requirements where reductions in welfare benefits have affected large numbers of recipients. For example, in Riggins v. Graham, 20

Ariz. App. 196, 511 P.2d 209, 212-214 (1973), the Arizona Court of Appeals held that a statewide reduction of benefits is a rule-making function and not an adjudicatory function. Likewise, where the uniform application affected individual recipients differently the federal district court in Vermont still characterized the action as rule-making. Provost v. Betit, 326 F.Supp. 920 (1971).

The significance of the rule-making versus adjudication distinction goes to the standard of due process required. The federal district court in Provost stated:

The plaintiffs rely on Goldberg v. Kelly [citation omitted], and subsequent lower court decisions which reason, by analogy to Goldberg, that a reduction in welfare benefits must be preceded by notice and an opportunity to be heard.

[Citations omitted.] This reliance, it would appear is misplaced. We are not here dealing with a factual determination that the level of an individual's grant should be reduced because of a change in individual circumstances, but rather with a state-wide social welfare policy impartially affecting all welfare recipients.

Provost v. Bell, at 922.

In citing Provost, the New Mexico Supreme Court reached the same conclusion in State ex rel. Ellis v. Heim, 83 N.M. 103, 488 P.2d 1207, 1208 (1971). However, the Mathews test used by the Court of Appeals in the instant case is based upon Goldberg v. Kelly, 397 U.S. 254, 263-271 (1970), i.e., after stating the test the Court in Mathews cites Goldberg to that effect. Mathews v. Eldridge, at 335. The reason the Mathews test is based upon Goldberg is because the issue in Mathews was whether

an individual recipient of disability benefit payments under the Social Security Act was entitled to a pretermination evidentiary hearing before termination of his benefits could occur. Thus, as in Goldberg, the issue revolved around the administrative adjudicatory function and not rule-making.

Conversely, the courts in Riggins, Provost and Ellis, *supra*, rejected the use of standards applicable to the state agency's adjudicatory function where the state agency was implementing mass changes and thus exercising its rule-making function. The Court of Appeals in Foggs should have similarly rejected application of the Mathews balancing test standard because the Mathews test was based upon Goldberg v. Kelly and the state's exercise of its adjudicatory

function and not its rule-making function. As the court in Provost stated:

While an adjudicative proceeding applies set standards to an individual case, rule-making results in a change of standards generally applicable to a class. . . .

The distinction is important. As the terms imply, exercise of the rule-making function of an agency is akin to legislative enactment, albeit delegated. Exercise of the adjudicative function is analogous to a judicial proceeding in which particular facts are measured against legislative standards of uniform applicability. The scope of judicial review mandated by the due process clause is of necessity different in the two cases.

Provost v. Betit, at 923.

The Mathews balancing test should not have been applied in the instant case and, in short, for that reason, if for no other, the decision of the Court of Appeals should be reversed.

B. Administrative Burden Exceeds Benefit Gained by Individual Recipients.

Moreover, even if the Court of Appeals in the instant case properly applied the Mathews test, that court failed to give sufficient weight to the administrative burden. In the State of Washington, alone, approximately 20,000 households were affected by the reductions made in the food stamp program by the OBRA 1981 Amendments. Of those households none were terminated from benefits as a direct result of the change in the income deduction. For each \$150 of earned income counted the average reduction in benefits came to approximately \$1.00. The average reduction per household was \$2.00. Thus the total reduction statewide came to \$40,000 (\$2 x 20,000).

However, it has been calculated that the total cost of making a particularized mailing containing information that pertains to that individual household is approximately \$2.45 per case. That includes administrative and computer costs as well as the actual cost of the materials. Thus, a particularized individual mailing for 20,000 households would cost Washington \$49,000--or \$9,000 dollars more than the total budget reduction saved!

This increase in expenditures occurs in the month the notices are issued. But in Washington, mass changes as defined under 7 C.F.R. § 273.12(e) occur approximately fifteen to twenty times per month. Thus the Foggs decision represents a significant increase in administrative costs to the state

along with a heavy administrative burden.

Also, we would point out that contrary to the findings of the Court of Appeals regarding Massachusetts, the State of Washington has not received a single report of an error in reductions of benefits as a result of the mass change in the income deduction, and no recipient household was terminated from the food stamp program as a result of the deduction change. Thus the burden on the individual recipients is minimal if not entirely nonexistent.

**C. Court Of Appeals Engaged
In Judicial Legislation.**

Federal administrative regulations required that:

Prior to any action to reduce or terminate a household's benefits within the certification period, the State agency shall, except as provided in

paragraph (b) of this section, provide the household timely and adequate advance notice before the adverse action is taken.

7 C.F.R. § 273.13(a) (1981).

In an adverse action situation the notice must contain the following elements:

The proposed action, the reason for the proposed action; the household's right to request a fair hearing; the telephone number and, if possible, the name of the person to contact for additional information; the availability of continued benefits; and the liability of the household for any overissuances received while awaiting a fair hearing if the hearing official's decision is adverse to the household. If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service.

7 C.F.R. § 273.13(a)(2) (1981).

Under paragraph (b) the exemptions

from adverse notice include when:

(1) The State initiates a mass change as described in § 273.12(e).

7 C.F.R. § 273.12(e) (1981) regarding mass changes provides:

Certain changes are initiated by the State or Federal government which may affect the entire caseload or significant portions of the caseload. These changes include adjustments to the income eligibility standards, the shelter and dependent care deductions, the Thrifty Food Plan, and the standard deduction. . . .

[Emphasis supplied.]

Because the OBRA Amendments reduced the standard deduction from 20 percent to 18 percent and because there were "significant portions of the caseload" affected (20,000 households in Washington) the Secretary of Agriculture authorized "mass change" notices. 46 Fed. Reg. 44712, 44722 (September 4, 1981). Federal regulations also provide that:

A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change.

7 C.F.R. § 273.12(e)(2)(ii) (1981).

The Court of Appeals concluded that no notice of "adverse action" was required. Foggs v. Block, at 940. However, the Court nevertheless held that the recipients "were entitled to meaningful advance notice." Foggs v. Block, at 940. The Court of Appeals then agreed with the district court and found that mass notice given by the State of Massachusetts:

. . . was difficult to read, relatively difficult to comprehend, ambiguous (in that it indicated only that benefits would be reduced or termin-

ated), and that it lacked the specific information necessary to allow recipients to determine if a calculation [error] had been made.

Foggs v. Block, at 938.

The Court did not specify what wording would be easier to read and easier to comprehend. However, in affirming the district court's decision it in effect held that notices must contain "financial data for each individual recipient." Foggs v. Block, at 936. Because the district court found that "The notice did not indicate the specific amount of reduction, nor did it indicate the recipient's new benefit amount" presumably this is what "financial data" must be included in each individual notice. Foggs v. Block, at 935. But the federal statutory

requirements for notice of adverse action, much less mass change notices, have no such requirement. The Court's decision, in effect, thus exceeds the statutory requirements of adverse action notice.

The Court of Appeals, in essence, has said that the more stringent requirements of notice of adverse action need not apply because of the mass change exemption. Nevertheless, the Court of Appeals then concludes that "financial data for each individual recipient" is required. The conclusion of the Court of Appeals exceeds the very statutory requirements of notice of adverse action that the same court just determined need not be applied!

In order, apparently, to avoid addressing head-on the issue of the

sufficiency and constitutionality of the federal statutory notice requirements the Court then said:

We doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement and thus we affirm the district court's conclusion that the December notice failed to satisfy the notice requirements of 7 U.S.C. § 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii).

Foggs v. Block, at 940. By this means the Court of Appeals, by stating that it is merely ruling on the Massachusetts' notice, read language requiring "financial data for each individual recipient" into federal statutory law when the requirement is not there on a plain reading of the federal statutes and regulations. The Court thus acted in a legislative fashion inappropriate for a judicial body. Osborn v. Bank of

the United States, 22 U.S. 738, 866 (1924).

V. CONCLUSION

The State of Washington urges this Court to review the decision of the Court of Appeals and uphold the sufficiency of the Massachusetts' notice for three reasons: First, the Court inappropriately applied the Mathews v. Eldridge balancing test in an agency rule-making function. Second, the Court failed to take proper account of the high administrative burden placed upon the states to effectuate the large number of mass changes that occur and the inversely low number of errors or terminations that result from such changes. And third, the Court of Appeals engaged in unauthorized legislative activity in requiring individualized notices for mass changes

where federal law has no such requirement.

DATED this 26th day of July, 1984.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

FILED

AUG 8 1984

ALEXANDER L. STEVAS

CLERK.

Nos. 83-1660 and 83-6381

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

GILL PARKER, et al.,
Petitioners,
v.
JOHN R. BLOCK, Secretary
of Agriculture, et al.,

CHARLES M. ATKINS, Commissioner, Massa-
chusetts Department of Public Welfare,
Cross-Petitioner,
v.
GILL PARKER, et al.,

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COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE STATES
ILLINOIS, INDIANA, PENNSYLVANIA AND
WISCONSIN IN SUPPORT OF CROSS-PETITIONER

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ILLINOIS, INDIANA, PENNSYLVANIA AND
WISCONSIN IN SUPPORT OF CROSS-PETITIONER

QUESTION PRESENTED

Whether due process requires that notices implementing legislatively mandated across-the-board welfare benefit reductions contain recipient-specific information.

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AND
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INTEREST OF AMICI CURIAE

Amici have each been involved in cases where the federal courts have ruled that due process requires that detailed recipient-specific information be contained in notices implementing federally mandated mass reductions in welfare benefits. See Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975); Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976); Dilda v. Quern, 612 F.2d 1055 (7th Cir.), cert. denied, 447 U.S. 935 (1980); Buckhanon v. Percy, 533 F. Supp. 822 (E.D. Wis. 1982), aff'd in part and rev'd in part, 708 F.2d 1209 (7th Cir. 1983), cert. denied, 104 S. Ct. 1281 (1984); Jones v. Blinziner, 536 F. Supp. 1181 (N.D. Ind. 1982); Philadelphia Welfare Rights Org'n. v. O'Bannon, 525 F. Supp. 1055 (E.D. Pa.

1981). Like this case, Buckhanon, Blinziner and O'Bannon involve across-the-board reductions in welfare benefits which were mandated by Pub. L. No. 97-35, the Omnibus Budget Reconciliation Act of 1981 ("OBRA"). In each of these cases, the courts have held that a federal decision that benefits should be reduced may not be implemented with respect to any recipient until such time as s/he is furnished with detailed recipient-specific information including mathematical calculations explaining precisely how his or her new, lower level of benefits was determined.

The costs incurred by the states as the result of these adverse decisions have been substantial. Enormous administrative burdens are incurred in computer programming and related forms of benefit computation, in devising notices

containing mathematical calculations and lengthy explanatory material and in completing mailings prior to legislatively imposed deadlines. Federal statutes, such as 42 U.S.C. §§ 603 and 1301(8)(A), which require the states to fund a proportionate share of these programs, in combination with the United States Department of Health and Human Services' efforts to recover federal matching funds under 45 C.F.R. § 201.6 (1983) have also forced the states to bear the brunt of the expense associated with continuing benefits at levels higher than those mandated by Congress. For example, in Buckhanon, a case which is still pending in the district court, Wisconsin estimates that over \$1.5 million in benefits is still at issue and that the entire sum may ultimately have to be paid from state revenues.

The court of appeals' decision on the due process question continues to subject the states to the administrative burdens associated with having to prepare lengthy explanatory materials which include individualized calculations for millions of welfare recipients. The decision also continues to place the states and the federal government in jeopardy of having to comply with injunctions which extend prior levels of benefits, thereby granting multimillion dollar awards of state and federal revenues whenever a benefit reduction notice is subsequently determined to be constitutionally deficient.

SUMMARY OF ARGUMENT

The court below held that the food stamp benefit reduction notices issued by Massachusetts were constitutionally deficient because they "did not include

financial data for each individual recipient." Foggs v. Block, 722 F.2d 933, 936 (1st Cir. 1983).

Illinois, Indiana, Pennsylvania and Wisconsin challenge the conclusion that such financial data is constitutionally required. The federal regulations governing the issuance of notices afford purely procedural protections designed to allow recipients to plan for legislatively mandated benefit reductions. There is no statute or regulation which creates a substantive property right to the receipt of benefits at levels not authorized by Congress. Recipient-specific benefit notices therefore are not constitutionally mandated because no substantive property right is affected when benefit reductions prescribed by Congress are implemented.

ARGUMENT

Due Process Does Not Require That Notices Implementing Legislatively Mandated Across-The-Board Welfare Benefit Reductions Contain Recipient-Specific Information.

- A. The due process protections of the fourteenth amendment extend only to individuals with a vested interest in liberty or property.

"The Due Process Clause applies when government action deprives a person of liberty or property" Greenholtz v. Inmates of Nebraska Penal & Cor., 442 U.S. 1, 7 (1979). "To determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 (1972). Last term, in another due process case, this Court opined that:

In theory a court might be able to define the scope of a

patient's federally protected liberty interest without reference to state law. Having done so, it then might proceed to adjudicate the procedural protection required by the Due Process Clause for the federal interest alone.

Mills v. Rogers, 102 S. Ct. 2442, 2448 (1982).

There are no state created liberty or property interests at issue here. But, an individual could conceivably have a federally created property interest in the receipt of welfare benefits at preexisting levels. Compare Mills v. Rogers, 102 S. Ct. at 2448 n. 16, with Goldberg v. Kelly, 397 U.S. 254, 262 n. 8 (1970). Under the Court's holding in Greenholtz, 442 U.S. at 7, since this case involves "a claimed denial of due process," it is therefore necessary to "inquir[e] into the nature of the individual's claimed interest" in order to determine whether recipient-specific

information is constitutionally required in connection with legislatively imposed benefit reductions.

B. No deprivation of a property interest occurs in connection with legislatively imposed reductions in welfare benefits.

It has never been suggested that there is a constitutional right to any minimum level of subsistence in the form of the receipt of welfare benefits. Cf. Richardson v. Belcher, 404 U.S. 78, 82 (1971); Dandridge v. Williams, 397 U.S. 471, 487 (1970). The reason is that welfare involves the distribution of property rather than the preservation of liberty: "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law

...." Roth, 408 U.S. at 577. In the social benefit context, absent a showing of discriminatory intent, a legislative decision to reduce or eliminate benefits therefore may not be challenged on due process grounds because no "accrued property right" exists with respect to the continuation of such benefits. Flemming v. Nestor, 363 U.S. 603, 608 (1960). Any property interest that could exist in the continued receipt of welfare benefits would have to be "created and defined by statutory terms" Roth, 408 U.S. at 578. Thus, federal law "may recognize liberty [or property] interests more extensive than those independently protected by the Federal Constitution ... [or] confer procedural protections ... that extend beyond those minimally required by the Constitution of the

United States." Mills v. Rogers, 102 S. Ct. at 2449.

The federal regulations in effect now and at the time of the passage of OBRA require the states to give timely and adequate advance notice of legislatively imposed food stamp, Medicaid and AFDC benefit reductions. 7 C.F.R. § 273.13(a) (1981); 42 C.F.R. § 431.211 (1981); 45 C.F.R. § 205.10(a)(4)(i) (1981). AFDC benefit reduction notices must meet the requirements of 45 C.F.R. § 205.10(a)(4)(iii) (1981), which provides:

When changes in either State or Federal law require automatic grant adjustments for classes of recipients, timely notice of such grant adjustments shall be given which shall be "adequate" if it includes a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

The relevant MA regulation, 42 C.F.R. § 431.210 (1981), similarly mandates:

(a) A statement of what action the agency intends to take;

(b) The reasons for the intended action;

(c) ... the change in Federal or State law that requires the action;

(d) An explanation of --

....

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

The food stamp regulation is less stringent:

A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to

households to inform them of the change.

7 C.F.R. § 273.12(e)(2)(ii) (1981).

Not all procedural enactments protect an underlying substantive right. Substantively, "benefits are a matter of statutory entitlement for persons qualified to receive them." Goldberg v. Kelly, 397 U.S. at 262 (emphasis added). The notice provisions of the quoted regulations do no more than afford purely procedural protections. They do not provide any form of permanent entitlement to benefits at levels unauthorized by Congress if recipient-specific information is not furnished to each individual. By making extended benefits subject to recoupment, 7 C.F.R. § 273.15(k)(1) (1981), 42 C.F.R. § 431.230(b) (1981) and 45 C.F.R. § 205.10(a)(6)(i) (1981) expressly negate the contention that the regulations

themselves create substantive property rights. The regulations' purpose in requiring generalized notices is "to give all ... recipients an opportunity to adjust by having notice of a program change before any alteration is effectuated." Budnicki v. Beal, 450 F. Supp. 546, 551 (E.D. Pa. 1978). Stated another way, such notices are issued to allow recipients "to plan for the cut, and to the extent possible adjust to it ... [by providing] minimum advance warning to beneficiaries about to be deprived of benefits upon which they may have been counting heavily." Rochester v. Baganz, 479 F.2d 603, 606-07 (3rd Cir. 1973). With respect to the implementation of legislatively determined changes in benefit levels, "the soundness of such a [notice and hearing] procedure lies in its likelihood

of adoption of reasonable policies less prone to judicial attack, rather than in constitutional law." Provost v. Betit, 326 F. Supp. 920, 924 (D. Vt. 1971). Aside from the regulations, OBRA itself is the only federal enactment governing the implementation of the kinds of benefit reductions challenged in this case. But OBRA did not continue any substantive property right to receive a prior, higher level of benefits. To the extent that any such right may formerly have existed, OBRA extinguished it. Thus, there is no statute or regulation which creates a substantive property right to the receipt of benefits at preexisting levels when recipient-specific notices are not sent.

Without recitation of authority, the court of appeals held that Congress could extinguish what that court determined to

be an underlying substantive property interest only by entirely eliminating each benefit program, and that, "[s]o long as the programs exist," a deprivation of property occurs whenever benefits are reduced. Foggs v. Block, 722 F. 2d at 937. This reasoning stands the concept of due process on its ear. It means that detailed recipient-specific information would be constitutionally required whenever Congress chooses to cut benefits by twenty-five, fifty, or even ninety-nine percent, but that no notice whatsoever would be constitutionally required when benefits are extinguished -- presumably the situation when the individual would suffer the most grievous loss and would be most in need of a timely and adequate notice. The court of appeals seemingly recognized that any property interest which might exist in

the continued receipt of welfare benefits derives from statutory entitlement. It then failed to apprehend that any such property interest is subject to partial or complete alteration through legislative action.

The authorities cited by the court of appeals also do not support its alternative initial premise that "courts considering across-the-board statutory modification in federal public assistance programs" have "uniformly accepted" the "notion that statutory reductions infringe a protected property interest" Foggs v. Block, 722 F.2d at 937. Garrett v. Puett, 557 F. Supp. 9, 11 (M.D. Tenn. 1982), aff'd per curiam, 707 F.2d 930 (6th Cir. 1983) merely held that the benefit reduction notices issued in that case complied with the applicable procedural regulations and that those

regulations were not constitutionally infirm. Somewhat similar kinds of analyses were employed in Turner v. Walsh, 435 F. Supp. 707 (W.D. Mo. 1977) aff'd per curiam, 574 F.2d 456 (8th Cir. 1978); Benton v. Rhodes, 586 F.2d 1 (6th Cir. 1978); and Punohu v. Sunn, 666 P.2d 1135 (Hawaii 1983). With the exception of Garrett v. Puett, the six cases cited by the court of appeals, 722 F.2d at 937-938, either do not discuss the property interest question at all or short-circuit the two-step constitutional analysis required by such cases as Hagans v. Lavine, 415 U.S. 528, 543 (1974) and Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Since they do not first examine whether the applicable procedural regulations were complied with and then determine whether those regulations fail

to afford procedural protections sufficient to safeguard some kind of identifiable, constitutionally protected property interest, the constitutional conclusions reached by these courts lack foundation. The court of appeals' reasoning suffers from this same infirmity. It begs the question to conclude that, because a due process analysis was employed, a deprivation of property must have occurred. Foggs v. Block, 722 F. 2d at 940. A due process analysis may properly be employed only if a property interest is first identified. There simply is no well-reasoned authority for the proposition that the United States Constitution requires the issuance of detailed recipient-specific information in connection with welfare benefit reductions imposed by Congress because no

court has established the legal foundation for the concept that a deprivation of an accrued property right occurs when such legislative determinations are made.

The remedy which the court of appeals granted belies the existence of the property right which it claims to have identified. The district court's award of retroactive benefits was reversed because, "[r]estoration of benefits would constitute a windfall to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress." Foggs v. Block, 722 F.2d at 941. It is precisely because Congress extinguished any property right to receive benefits at these higher, preexisting levels that the due process claims raised by petitioners must fail.

The question presented in this case was left open at the time of the issuance of the Court's decision in Goldberg v. Kelly. See Wheeler v. Montgomery, 397 U.S. 280, 284-85 (1970) (Burger, C.J., dissenting). The Sixth Circuit and the Seventh Circuit are now at opposite ends of the legal spectrum. This Court has said that "there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations." Greenholtz, 442 U.S. at 7. If such a constitutional guarantee generally does not exist in connection with discretionary executive action, it can hardly exist when the executive branch is acting in compliance with a substantive legislative decision. The Court should hold that there is no underlying property interest protected by the procedural

federal regulations governing notice of the implementation of legislatively mandated benefit reductions. States that issue notices in compliance with those regulations will then no longer be subjected to subsequent court decisions granting multimillion dollar windfall awards of tax monies on constitutional grounds.

CONCLUSION

The court of appeals' determination that Massachusetts failed to accord its food-stamp recipients due process of law in connection with the issuance of across-the-board notices implementing a congressionally mandated reduction in benefits should be reversed.

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